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Supreme Court, U.S.
FILED
09-461 OCT 19 2009
OFFICE OF THE CLERK

No. 09-____

IN THE
Supreme Court of the United States

STEPHEN MICHAEL WEST,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 19, 2009

CAPITAL CASE

QUESTION PRESENTED

Whether trial counsel's failure to investigate and present evidence at sentencing of the defendant's severe childhood abuse can be dismissed on the basis of unsupported conjecture by the Court of Appeals that the jury might have concluded that "violence begets violence" and might have "despised [the defendant] and sentenced him to death with greater zeal," leaving the court able only to "speculate" what effect the evidence actually would have had, and thereby foreclosing a conclusion that the defendant was prejudiced by counsel's failure to present the evidence.

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PETITION FOR A WRIT OF CERTIORARI

Stephen Michael West ("West") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The December 18, 2008 divided opinion of the Court of Appeals is reported at 550 F.3d 542 and reprinted in the appendix to this petition ("Pet. App.") at 1a-58a. The District Court's September 30, 2004 memorandum opinion is unreported and reprinted at Pet. App. 59a-363a.

JURISDICTION

The Court of Appeals entered its judgment on December 18, 2008, and denied a timely petition for rehearing and rehearing en banc on May 20, 2009. Pet. App. 428a-429a. On July 22, 2009, this Court granted an application to extend the time to file a petition for a writ of certiorari to October 17, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a criminal defendant's constitutional right to the effective assistance of counsel under the Sixth Amendment, which provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

A. Introduction

The sentencing jury in this capital case never heard substantial evidence that petitioner Stephen West, born inside a mental hospital, was subjected to severe abuse from the time he was a baby – that his mother would pick him up by his feet and sling him against the wall, leaving him bleeding and throwing up, and that she stated she would kill him if she could get away with it. Despite obvious red flags, trial counsel failed to investigate West's abusive childhood and therefore could not present evidence of this kind at sentencing. On habeas corpus review, a divided panel of the Sixth Circuit dismissed the significance of this evidence. It openly recognized that "[t]he jury might have believed that the abuse made West the kind of person who was psychologically unable to confront or disobey strong, threatening people such as Martin [West's co-defendant]. The jury might have pitied West and chosen to spare his life." Pet. App. 25a-26a. However, without any support, the majority also conjured another possibility: "[T]he very same evidence may have had the opposite effect on the jury. They might have believed that violence begets violence and that West's past abuse made him the kind of person who could have raped and tortured a fifteen year-old girl. They might have despised West and sentenced him to death with greater zeal." Pet. App. 26a.

It is difficult to imagine how a jury could have "despised" West and "sentenced him to death with greater zeal" because he was repeatedly beaten as a

child, or concluded that such "violence begets violence" and therefore justified West's execution. Pet. App. 26a. But having decided that the jury "might have" reacted in such a way to this evidence, the majority concluded that it could not find "prejudice" resulting from counsel's failure to investigate and present the evidence. It held that "[i]t is not enough for this court to speculate that the jury would have chosen the former path" (and "pitied" West rather than "despised" him), and therefore "we cannot conclude that there was a reasonable probability that the jury would have chosen to spare West's life." *Id.*

The decision of the Court of Appeals is grossly wrong, but it also is more broadly significant. It is wrong because there is no reasonable basis for the majority's conjecture that this evidence could have been perceived as aggravating, and because the "prejudice" component of *Strickland v. Washington*, 466 U.S. 668 (1984), does not require more than what the Sixth Circuit majority explicitly recognized: that "[t]he jury might have pitied West and chosen to spare his life." Pet. App. 26a. Indeed, West was not even required to show that "the jury" in its entirety would have been so moved; it is sufficient that if this evidence had been placed "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

But the decision also is more broadly significant. It reflects a widening divergence regarding how courts view a failure to present mitigation evidence,

and particularly evidence that conceivably might be viewed by some jurors in a negative light – a characterization that is possible for virtually *any* evidence (including, according to the Sixth Circuit here, being severely abused as a child). According to the panel, evidence that "might" have differing effects upon the jury leaves the court forced to "speculate" whether the jury would have viewed the evidence favorably or unfavorably, and therefore forecloses any finding of "prejudice" from counsel's failure to investigate and present the evidence. Pet. App. 26a. Other courts have expressed a similar view. *See, e.g.*, *Bowie v. Branker*, 512 F.3d 112, 121 (4th Cir.), *cert. denied*, 128 S. Ct. 2972 (2008) ("mitigating evidence . . . should be discounted, under our precedent," if "double-edged"); *Harris v. Cockrell*, 313 F.3d 238, 244 (5th Cir. 2002) ("The failure to present such double-edged evidence is not prejudicial."); *Willacy v. State*, 967 So. 2d 131, 144 (Fla. 2007) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword."), *cert. denied*, 128 S. Ct. 1665 (2008).

But many other courts, discussed below, view mitigation evidence very differently, and also do not dismiss the potential significance of mitigation evidence simply because it might be characterized as "double-edged." These courts recognize, consistent with precedents of this Court, that mitigation evidence generally *explains* violence that already has been found, rather than negating the possibility that such violence might occur.

As a result of these differing approaches, the death penalty presently is not being administered in an even-handed manner among the states that allow it. In some states and circuits, counsel's failure to investigate and present mitigation evidence is readily discounted because that evidence might have some aggravating edge (taken to the extreme here with the suggestion that evidence of being slammed into a wall as a child perhaps simply "begets violence"). In other states and circuits, counsel's failure to investigate and present such mitigation evidence is found to violate the defendant's fundamental right to the assistance of counsel. Although this Court has addressed in several cases counsel's obligations to conduct a full investigation of potential mitigation evidence, the Court has not addressed as extensively how courts should determine whether counsel's failure to do so creates a "reasonable probability" that the outcome of the proceeding would have been different.

For these reasons, petitioner respectfully requests that the Court grant this petition for certiorari.

B. Factual Background

1. West's Childhood

West's mother gave birth to him in a mental institution; she had been placed there after she tried to commit suicide. 6th Cir. JA at 1883-84. His father was a lifelong alcoholic and a violent man who openly questioned West's paternity. Pet. App. 407a.

Under the care of these parents, West's childhood was cruel and traumatizing. Both his mother and his father brutalized him from the time he was a

baby. 6th Cir. JA at 329, 1954-55. His mother would beat him mercilessly by "[s]winging a belt so long and so hard that it would wear her out." *Id.* at 1955. She hit him with shoes and struck him so hard that he became cross-eyed. The beatings left West with "[b]ruises, black eyes, busted lips, pulled hair, pinch marks." *Id.* They were never predictable and occurred without reason. *Id.*

West's aunt, who lived in an apartment above West's family, witnessed some of this horrible abuse. Specifically, she recalled that West's mother swore at him, beat him, threw him against the wall by his feet, and would leave him in a cold room on a mattress wet with urine. His aunt explained: "She was always hitting him. He had bruises on him; pinching him; sling him back in that room if he came out." 6th Cir. JA at 1990.

She also vividly described one example of the kind of abuse that West regularly suffered:

> I came down. Patty [West's sister] came out to get some food for Steve and she [West's mother] started swearing at them and she ran in there and just slung Steve up against the wall; grabbed him by his feet. There was blood and he started throwing up. And she said, "I feel like killing the little bastard." She walked out. I cleaned them up and took them to the hospital. His nose was bleeding and his mouth was bleeding.

6th Cir. JA at 1989-90.

West's oldest sister, Debra, remembers him being slapped in the head and hit with shoes throughout his childhood. Pet. App. 407a. She portrayed him as

the family scapegoat: "If my other brother did something wrong, Steve got beat for it. My sister and I would try to get between them, and we would get beat, and then his beating was finished, and this was not just one or two times. This was from the time I can remember Steve coming home from the hospital." 6th Cir. JA at 1886. Debra described their father as an alcoholic who was violent when sober and even more violent when drinking. *Id.* at 1886-87. Like West's aunt, Debra remembered at least one occasion when West's mother threw him against a wall to punish him. Pet. App. 407a.

The abuse was so merciless that neither West nor his sister, Patricia, has any recollection of the first decade of their lives. West's mother eventually told him that during that period his ankles were broken at least seven times and he also suffered broken toes and a fractured elbow. 6th Cir. JA at 414.

In response to this abuse, West never became violent or fought back. Debra explained that West would "duck" when either of his parents raised a hand near him. 6th Cir. JA at 1887. His aunt said:

> He was very timid. He never said anything. He would just cry. If he saw her coming towards him he'd scream out and start crying and just stand there and let her beat him. A few occasions I asked her, "Please why are you doing this?" She said, "If I could kill him and get away with it I would."

Id. at 1990.

All of this evidence adds up to a compelling mitigation case under this Court's precedents. As explained below, however, West's counsel never

investigated these issues prior to sentencing, and the jury that sentenced West to death never heard any of this evidence.

2. The Crime

In 1980, West escaped his home at the age of seventeen by joining the Army. While in the Army, West's alcohol and drug problem, which began during his early teens, intensified. Regardless, he served honorably and was discharged in 1983. After leaving the Army, West married his wife, Karen, who was pregnant with their first child at the time of the crimes at issue in this case. He also met his co-defendant, seventeen-year-old Ronnie Martin ("Martin"). Prior to this case, West had no criminal record.

In the early hours of March 17, 1986, West and Martin left their work at a McDonald's in Lake City, Tennessee and, many hours later, arrived at and were admitted into the Romines household in Union County, Tennessee. Martin was an acquaintance of fifteen-year-old Sheila Romines. Sometime between the hours of 6 a.m. and 8:30 a.m., Sheila and her mother, Wanda, were stabbed to death. Sheila had been raped before she was killed. *State v. West*, 767 S.W.2d 387, 389-90 (Tenn. 1989). Martin and West were arrested the next day. The trials were severed, and the trial against West proceeded first.

3. Trial Proceedings

Two attorneys represented West: Richard McConnell and Thomas McAlexander. West's parents had hired McConnell, who had no experience in capital cases, to represent West. McAlexander,

court-appointed co-counsel, also had no capital experience. 6th Cir. JA at 1872-73, 1966-67.

The key issue at West's trial was his level of involvement in the murders and his susceptibility to manipulation by Martin, a more dominant personality. There was no question that West had accompanied Martin into the Romines home and that he was there with Martin at the time of the crimes; evidence also showed that West was involved in the rape of Sheila Romines. However, West testified during the guilt phase that it was Martin who had "stabbed and killed" the two women. 6th Cir. JA at 1717. West testified that Martin threatened West with a gun and said that he would kill West and West's wife if he told anyone what had happened inside the Romines home. The prosecution introduced prior statements that West had made in which West described Martin stabbing Sheila Romines; West recounted that when the victim asked Martin why, Martin replied, "I owe you, I owe you." *Id.* at 1731-32.

West's attorneys sought to introduce two taped jailhouse conversations demonstrating that Martin was the main perpetrator and that Martin, not West, had killed Wanda and Sheila Romines. On these tapes, Martin told his cellmate that he had killed both women.[1] The trial court excluded this evidence.

West's attorneys also sought to present testimony from Libby Woods, an acquaintance of both Martin and Sheila Romines. Woods was prepared to testify that Martin had said he would kill Sheila; that he

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[1] The Sixth Circuit transcribed the tapes in its opinion. Pet. App. 27a-28a.

was upset with her for striking and embarrassing him in front of some other students at school; that he wanted to date and have sex with her and she resisted his advances; and that Martin had said that he owed her, and that is why he would kill her. 6th Cir. JA at 1739. The trial court would not allow this testimony.

The prosecution focused heavily on portraying West and his legal team as liars. During closing argument, the prosecutor argued on eleven separate occasions that defense counsel were attempting to mislead or deceive the jury by "blowing smoke" or "throwing sand" in jurors' eyes. The prosecutor also repeatedly called West a liar and made several inflammatory statements not supported by the evidence. 6th Cir. JA at 1761 ("He said that Ronnie took the knife and killed both women. We know that that is a lie. We know that that is a lie. . . . That's a lie. That's a lie. . . . That's a lie.").

The jury found West guilty of two counts of murder, one count of aggravated rape, two counts of aggravated kidnapping, and one count of grand larceny. *State v. West*, 767 S.W.2d at 389, 403.

During sentencing, the prosecutor relied mostly on the evidence presented at trial and again called West a liar and a coward. He also improperly told the jurors that they should not feel responsible about opting for the death penalty because they "did not set punishment in this case, per se." 6th Cir. JA 1811. "[T]he law . . . is self-executing," he said, "in the sense that the law mandates, requires a death sentence in certain situations, unless it is outweighed by other factors." *Id.* at 1810.

West's attorneys put on minimal mitigation evidence; their entire mitigation case consumed only twenty pages of transcript. Such a short case is not surprising in light of how little investigation West's counsel did. Despite the fact that counsel knew West had no memory of the first ten years of his life, as well as the presence of several other red flags, counsel did not seek to interview family members about potential abuse, concluding that doing so would have been a waste of time. McAlexander, who spent *four hours* preparing for sentencing, spoke with West's parents and said "it was like running into a brick wall." 6th Cir. JA at 1715. McAlexander did not seek to investigate further, despite the parents' lack of cooperation. West's sister, Debra, later testified that she told counsel West had been subject to terrible abuse. Counsel, she testified, told her it was not relevant.[2]

In short, West's counsel did not investigate or present to the jury *any* of the evidence about West's brutal childhood that is recounted above. West's attorneys called no one to testify on the subject of the abuse, and the jury never heard any evidence

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[2] Dr. Ben Bursten, a mental-health expert tasked with exploring West's competency and a possible insanity defense, also did not discover West's childhood abuse. He spent only two or three hours with West and never asked West's family – who had hired him – any questions about abuse, despite knowing that West's father was an alcoholic. 6th Cir. JA at 1914, 1931. He omitted any such questioning because "[t]hey created such a picture of a close family." *Id.* at 1915. Asking them questions about abuse would have been "outrageous" in Dr. Bursten's opinion because "[y]ou have to be a little sensitive about the people you are talking to." *Id.*

touching on it. Ultimately, West's mitigation case (including testimony from West himself) emphasized that West had no behavior issues in jail, was a good husband and father, had been an honor student in school, and had no prior criminal record.

West's counsel presented no explanation for why West would have behaved passively and been dominated by Martin during the crimes. Yet his counsel argued that if the jury believed West actually committed the murders, it should send him to the electric chair with counsel's blessing. 6th Cir. JA at 1773. The jury sentenced West to death.

The Tennessee courts affirmed West's direct appeals, despite concluding that the prosecutor's closing argument was improper. *State v. West*, 767 S.W.2d at 399-400.

4. State Post-Conviction Proceedings

In 1990, West filed a petition for post-conviction relief with the state court, arguing that his attorneys were ineffective during sentencing because they should have discovered and presented mitigating evidence that might have convinced the jury to spare his life. The post-conviction court held evidentiary hearings that revealed that, prior to sentencing, West's counsel were aware of a number of facts that should have caused them to investigate the circumstances of West's childhood more closely.

For example, Paul Morrow, a post-conviction legal expert, testified that counsel's awareness that West's severe drug and alcohol problems were noted in Army records would have led reasonable counsel to look further into West's background. Post-Conviction Hr'g Tr. 408 (Oct. 22, 1996). Morrow also

testified that West's statement that he was present at the time of the crime and could not do anything to stop Martin was a red flag signaling that counsel should do a more thorough investigation into West's background and psychological makeup. *Id.* at 410. Finally, the fact that West had virtually no childhood memories before the age of ten was an indication of possible abuse. 6th Cir. JA at 1857-58.

Regardless of these red flags, McConnell and McAlexander readily admitted that prior to West's sentencing they did not conduct a probing investigation into West's background or into any issues of abuse within his family. McConnell testified that family members failed to come forward on the issue of abuse. McAlexander was not "entirely sure about [any allegations of] physical abuse, but if they were mentioned, there was nothing that created any kind of red flag in my mind about that being a factor that should have been inquired into." 6th Cir. JA at 1869. McConnell believed such an investigation "would have been chasing down blind alleys." *Id.* at 1971-72. With respect to conducting separate interviews of siblings and other family members outside the presence of West's parents in order to explore mitigation themes, counsel "certainly wouldn't have wasted time on that." *Id.* at 1955, 1971. Trial counsel also did not obtain West's school, employment, or medical records. *Id.* at 1969-70. Counsel agreed, however, that if they had an "inkling that there may have been a childhood problem" or mental problem, they "would have been obligated to" present that information at sentencing. *Id.* at 1977, 1983-84; Post-Conviction Hr'g Tr. 267.

Instead of investigating West's background for possible abuse, West's attorneys laid the burden of bringing up this sensitive subject on West and his family: "Mr. West never raised any physical . . . or sexual abuse or anything of this nature." Post-Conviction Hr'g Tr. 267. But the evidence was readily available if counsel had sought it out. West's sister Patricia testified during the post-conviction proceeding that she did not tell the attorneys about West's background of abuse because "[n]obody asked and I didn't think it would matter." 6th Cir. JA at 1957. And his sister Debra testified that she informed McConnell about West's history of abuse and that McConnell told her it was not relevant and that because West's parents were paying his fee, he would not raise it. *Id.* at 1888.[3] Other potential witnesses, including West's aunt, were simply never contacted. *Id.* at 1991.

In the post-conviction proceeding, West also presented testimony from Dr. Eric Engum, a clinical psychologist who diagnosed West as suffering from significant depression, longstanding in nature. Dr. Engum's findings of depression were so pronounced that he warned of the possibility of suicide several times in his report to the post-conviction court. He also concluded that West suffered from a severe mixed personality disorder. According to Dr. Engum, West is submissive and operates at the emotional level of a thirteen- to fifteen-year-old. 6th Cir. JA at 1834. The results of West's testing were consistent with those of an individual who had suffered from severe childhood abuse.

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[3] McConnell denied the conversation. 6th Cir. JA at 1983.

Testimony such as that presented by Dr. Engum could have been used at trial to provide an explanation for how West could stand by passively as Martin stabbed both victims. Dr. Engum concluded that "[u]nder extreme levels of stress . . . West may, in fact, experience brief temporary psychotic breaks." 6th Cir. JA at 425. West rated very low on psychological dominance testing, *id.* at 1834-35, supporting the theory that he was dominated by his co-defendant and acting under duress at the time of the offense, *id.* at 1860, as well as suffering from extreme emotional disturbance. *Id.* at 1850-51. Thus, evidence was available that while the crimes were being committed, West was "in an extreme situation, and he became essentially dysfunctional during that time." *Id.* at 1851.[4]

Post-conviction legal expert Morrow testified that this information would have explained West's actions during the crime. It would have fit hand-in-glove with trial counsel's theory of the case:

> [T]here is in this case a series of statements that Steve West gives that are reasonably incomprehensible unless you have the psychological background. His statement that a juvenile dominated him sounds on the surface incredible; his actions on that day of being dominated or not participating. Why didn't he run out the door? Why did he act the

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[4] Dr. Engum noted that in describing the events at the Romines' house, West told Dr. Bursten about experiencing intense fear, helplessness, and horror. He had tears in his eyes and was shaking. He told Dr. Bursten that he felt dazed and detached from his body and felt as if the events were "unreal." 6th Cir. JA at 1852, 1946-48.

> way he did? I'm sure that runs through jurors' minds. Is this person credible? Would a reasonable person act that way? You can't determine that in the abstract. If you know his psychological profile, his background as Dr. Engum spelled it out, there is a reason why he would have behaved that way.

6th Cir. JA at 1988. This evidence would have provided, for the first time, some explanation for why West stood by and did nothing during the murders.

Although this previously undiscovered evidence constituted a compelling case for a jury to spare West's life, the state habeas court denied relief. It recognized counsel's failure to investigate any issues of childhood abuse, explicitly finding that "[n]one [of West's family members] w[as] questioned concerning possible abuse." Pet. App. 420a. But the court denied relief on the ground that West had failed to prove *by a preponderance of the evidence* that the result of his trial would have been different had the newly discovered mitigating evidence been presented to the jury. *Id.*[5] That burden of proof is incorrect – indeed, it is the very same burden that this Court specifically has identified as "contrary to" *Strickland*. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) ("If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in

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[5] The state court focused on the absence of prejudice and made no finding that counsel's performance was adequate.

character or nature' and 'mutually opposed' to our clearly established precedent."). The Court of Criminal Appeals of Tennessee failed to correct the misstated burden of proof – indeed, that court failed even to apply *Strickland*'s two-part test for evaluating ineffective assistance claims. Pet. App. 419a-422a.

5. Federal Habeas Proceedings

On February 20, 2001, West filed a federal habeas petition. On September 30, 2004, the District Court dismissed West's petition. In doing so, the court declined to consider certain evidence that West had submitted – consisting primarily of additional, corroborating expert opinions – on the ground that West had failed to present that mitigation evidence to the state post-conviction court. *See* 28 U.S.C. § 2254(e)(2); Pet. App. 181a-182a.[6]

West then appealed to the Sixth Circuit. In affirming the decision below, the Court of Appeals recognized that the state court decision applied an incorrect burden of proof under *Strickland* and therefore was contrary to clearly established federal law. Pet. App.16a-17a. Nevertheless, the panel held that the state court reached the correct result. In examining the performance of West's trial counsel, the panel disposed of counsel's failure to investigate West's brutal childhood by concluding that counsel "did a fair amount of investigation," Pet. App. 23a, and by citing *Burger v. Kemp*, 483 U.S. 775 (1987), for the proposition that counsel's decision "not to

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[6] Although in petitioner's view this ruling was in error, petitioner does not rely on that contested evidence in this petition.

mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment," Pet. App. 22a. In addition, the Sixth Circuit ruled that even if West could prove that his counsel were ineffective, he had not shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Pet. App. 25a (quoting *Strickland*, 466 U.S. at 694).

In considering whether West had shown prejudice, the panel inexplicably determined – without citation of any authority or support – that evidence of the severe abuse West had suffered as a child might have been considered to be aggravating rather than mitigating, as the jury "might have believed that violence begets violence" and "might have despised West and sentenced him to death with greater zeal." Pet. App. 26a. On the basis of these "might haves," the court said that it could only "speculate" that the jury would have viewed the evidence as mitigating rather than aggravating. *Id.* The court concluded: "There must be 'a reasonable probability' that the proceeding would have been different. Given the strength of the evidence against West presented at trial and the weakness of the mitigating evidence that West presented during the post-conviction proceedings, we cannot conclude that there was a reasonable probability that the jury would have chosen to spare West's life." *Id.*[7]

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[7] The court did not explain its reference to the "weakness" of the mitigating evidence, but this statement followed immediately from its assertion that the jury might have "despised" West on

Judge Karen Nelson Moore dissented, explaining that the majority applied an outdated standard for assessing whether counsel was ineffective. Pet. App. 52a-54a. In Judge Moore's view, under *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), West had established that his counsel were deficient in ignoring "key pieces of evidence" of childhood abuse that "would have led a reasonable attorney to investigate further." Pet. App. 55a. Judge Moore also found that West was prejudiced by this deficiency, concluding that it was "extremely likely" that based on the undiscovered evidence at least one juror would have found the death penalty unwarranted. *Id.* Judge Moore explained that the majority's holding that this evidence could have been aggravating and did not undermine confidence in the reliability of West's sentencing simply "flies in the face" of this Court's decision in *Rompilla*. Pet. App. 57a. Judge Moore would have granted a conditional writ of habeas corpus with respect to the penalty phase. Pet. App. 58a.

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the ground that "violence begets violence" and the court could only "speculate" whether the evidence of childhood abuse would have had a mitigating effect on the jury.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION TO REVIEW THE SIXTH CIRCUIT'S DISMISSAL OF THE SIGNIFICANCE OF EVIDENCE OF SEVERE CHILDHOOD ABUSE.

The decision in this case is wrong and, if not addressed by the Court, will allow the execution of Stephen West before he has had a full and fair opportunity to present compelling, available evidence why the death penalty is inappropriate in his case. But even more important, the decision raises fundamental questions concerning the nature of mitigation evidence and how a court should evaluate the significance of a failure by counsel to investigate and present available mitigation evidence – questions as to which there is a marked and growing divergence of views in the lower courts.

The first issue in any case challenging the effectiveness of counsel is whether counsel's performance was deficient. *Strickland*, 466 U.S. at 687. In this case, however, the Sixth Circuit's view of the significance of the childhood abuse evidence at issue – which the court addressed in its analysis of the "prejudice" prong of *Strickland* – is integral to its evaluation of whether counsel's undisputed failure to investigate and present that evidence constituted deficient performance. As a result, it is essential to review this Court's precedents regarding the nature and significance of mitigating evidence, to compare the standards articulated in those cases to the Sixth Circuit's view of the significance of West's severe childhood abuse, and to compare how other lower

courts have assessed the significance of counsel's failure to present available mitigating evidence.[8]

A. In Upholding The Constitutionality Of The Death Penalty, This Court Has Emphasized The Critical Role Of Mitigation Evidence.

This Court has made clear that the presentation of mitigating evidence during a capital sentencing proceeding is absolutely essential to ensure that a defendant's sentence is adequately reliable – which is of particular concern where the sentence is death. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (explaining that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). Indeed, this Court has explained that it is because of

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[8] The Sixth Circuit noted that § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") permitted it to grant West's petition only if the original or subsequent state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Pet App. 20a. Because, as the Sixth Circuit concluded, the state courts' analysis of *Strickland*'s prejudice prong was plainly contrary to clearly established federal law, *id.* at 19a-20a, and the state courts did not address the deficient performance prong, the Sixth Circuit properly proceeded unencumbered by the state courts' analysis, as may this Court. *See id.*; *Williams v. Taylor*, 529 U.S. 362, 388-89, (2000) (explaining that the state court decision at issue was unreasonable because it "mischaracterized at best the appropriate rule, made clear by this Court in *Strickland*, for determining whether counsel's assistance was effective within the meaning of the Constitution").

"the need for reliability in the determination that death is the appropriate punishment" that the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *see also Roberts v. Louisiana*, 431 U.S. 633, 637 (1977); *Jurek v. Texas*, 428 U.S. 262, 271-74 (1976); *Gregg v. Georgia*, 428 U.S. 153, 189-90 & n.38 (1976).

Such evidence is relevant because it explains the defendant and his actions for the jury – it creates a complete picture of a flawed and complicated human being, to which the jury, in all of its complex humanity, can react. Thus, deeply embedded in this Court's jurisprudence is the principle that "punishment should be directly related to the personal culpability of the criminal defendant" and that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *see also, e.g., Lockett*, 438 U.S. at 604 (explaining that mitigation evidence is any evidence that might serve "as a basis for a sentence less than death"). Any other process necessarily "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members

of a faceless, undifferentiated mass." *Woodson*, 428 U.S. at 304.[9]

The prejudice analysis in this Court's Sixth Amendment cases reflects this understanding of the nature and purpose of mitigation evidence, and gives force to "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). Thus, in a series of cases, this Court has held that evidence showing that the defendant was subject to severe abuse as a child is mitigating, and that counsel's failure to introduce it at sentencing has a prejudicial effect by decreasing the reliability of the proceeding. *See Strickland*, 428 U.S. at 305 (explaining that counsel's assistance is ineffective where it deprives the defendant of "a trial whose result is reliable"). Such evidence humanizes and

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[9] *See also, e.g., McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (explaining that mitigating evidence permits jurors, who "bring to their deliberations qualities of human nature and varieties of human experience," to "focus their collective judgment on the unique characteristics of a particular criminal defendant," and to "make the difficult and uniquely human judgments that defy codification and that buil[d] discretion, equity, and flexibility into a legal system" (internal quotation marks omitted; bracketed in original)); *Eddings v. Oklahoma*, 455 U.S. 104, 110-13 (1982) (explaining that requiring consideration of mitigating evidence "is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual" and evinces a recognition that "a consistency produced by ignoring individual differences is a false consistency").

gives context – it shows that the person whom the jury already has decided is a killer is less blameworthy for his actions because of what others did to him when he was innocent and vulnerable.

For this reason, this Court found prejudice under the *Strickland* test in *Williams v. Taylor*, 529 U.S. 362 (2000), where trial counsel failed to uncover and present to the sentencing jury the "graphic description of Williams' childhood, filled with abuse and privation" as well as evidence of defendant's borderline mental retardation. *Id.* at 398. Such evidence "might well have influenced the jury's appraisal of his moral culpability." *Id.* In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court also found prejudice, explaining that "Wiggins experienced severe privation and abuse in the first six years of his life" and "has the kind of troubled history [that the Court has] declared relevant to assessing a defendant's moral culpability" – so that if this evidence had been placed "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 535, 537. In *Rompilla v. Beard*, 545 U.S. 374 (2005), the defendant suffered abuse as a child, was isolated and "lived in terror," and witnessed violence between his parents; this Court found that "[t]his evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of

[Rompilla's] culpability." 545 U.S. at 393 (internal quotation marks omitted; second bracket in original).[10]

B. The Sixth Circuit Trivialized The Significance Of Severe Childhood Abuse By Hypothesizing, Without Support, That The Jury Might Have Determined That "Violence Begets Violence" or "Despised" West Because Of His Abuse.

The Sixth Circuit's reasoning in this case cannot be squared with this Court's decisions concerning the relevance and importance of mitigating evidence, and particularly evidence concerning a defendant's abusive or deprived childhood. Here, and in every capital case, the jury did not even reach the question of sentencing until it had found that the defendant was guilty of a murder for which a sentence of death was potentially appropriate. The jury had *rejected* West's testimony that he was present but had no involvement in the crimes. As this Court repeatedly has recognized, the issue at sentencing was not *whether* West had played some role in these violent offenses, but *why* he had done so, why he had not stopped them or run away, and whether there was any evidence that might have influenced the jury's appraisal of his moral culpability.

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[10] *See also, e.g., Eddings*, 455 U.S. at 110, 113-15 & n.9 (concluding that evidence of Eddings' childhood, including "excessive physical punishment," was relevant mitigating evidence that the sentencer was required to consider under the Eighth Amendment); *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment) (evidence concerning a defendant's "emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment").

The evidence of the severe depredations West suffered in his abusive and unhappy childhood is the epitome of mitigating evidence under this Court's precedents. As in *Williams*, *Wiggins*, and *Rompilla*, its presentation would have allowed the jury to give force to our society's belief that the defendant was "less culpable" for the crimes because his acts were attributable not to some inherent wickedness but rather to his "disadvantaged background" and his resulting "emotional and mental problems." *Brown*, 479 U.S. at 545 (O'Connor, J., concurring).

The Sixth Circuit's dismissal of the significance of this mitigating evidence is flatly wrong for at least two reasons. First, there is simply no basis for the court's conjectures that the jury "might have" found West's victimization as a child at the hands of his parents to be *aggravating* on a theory that "violence begets violence" or that, because of this evidence, the jury "might have despised West and sentenced him to death with greater zeal." Pet. App. 26a. It simply defies logic and comprehension that any juror would have "despised" West with "greater zeal" because he was thrown against a wall by his mother when he was blameless and unable to defend himself. These "might have" conjectures of the Sixth Circuit are irreconcilable with everything this Court has written about the significance of mitigation evidence of this sort.

Second, the Sixth Circuit has misapplied this Court's precedents regarding the evaluation of prejudice resulting from counsel's failure to present mitigating evidence. Although the Court of Appeals explicitly recognized that "[t]he jury might have believed that the abuse made West the kind of

person who was psychologically unable to confront or disobey strong, threatening people such as Martin" and "might have pitied West and chosen to spare his life," Pet. App. 25a-26a, it found that this was not enough, solely because the court could conjure *other* conclusions that the jury "might have" reached. But this Court has never suggested that to prove prejudice a defendant must show that there is no adverse inference of any kind that conceivably might be drawn from the evidence. Indeed, a defendant need not even show "that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. Rather, a defendant only need show "a reasonable probability" that the outcome would have been different, which is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. As this Court held in *Rompilla*, "it is possible that a jury could have heard it all and still have decided on the death penalty," but "that is not the test." 545 U.S. at 393. And yet that is precisely the basis on which the Sixth Circuit rejected West's claim here. Because it hypothesized that the jury "might have" found the evidence to be aggravating and still sentenced West to death, it held that West had not established prejudice. Pet. App. 25a-26a.[11]

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[11] The court repeatedly posited what "the jury" might do, Pet. App. 25a-26a – but a reasonable probability that even a *single* juror would have changed his or her mind is sufficient to show prejudice. *Wiggins*, 539 U.S. at 537-38. It is inconceivable that not one person out of twelve would have viewed the evidence of West's severe childhood abuse as mitigating, rather than aggravating.

These errors alone, in a case of this nature, warrant this Court's review. However, there is a broader issue presented by this case, concerning the proper method of review of a failure by trial counsel to present so-called "double-edged" mitigation evidence, about which the lower courts are wildly inconsistent.

C. There Is A Wide Divergence Among The Lower Courts Concerning The Nature Of Mitigation Evidence And The Significance Of A Failure To Present It.

Even if the Sixth Circuit were correct that the evidence of West's severe abuse as a child somehow had an aggravating "edge," the Sixth Circuit's treatment of such evidence deepens a split among lower courts. Here, the Sixth Circuit gave what it treated as "double-edged" mitigating evidence essentially no weight in the *Strickland* prejudice analysis. In so ruling, the court joined several other courts that have discounted counsel's failure to present mitigating evidence on this basis.

Thus, the Fourth Circuit has held that in conducting a *Strickland* prejudice analysis, "mitigating evidence . . . should be discounted, under our precedent," if "double-edged." *Bowie*, 512 F.3d at 121; *see also, e.g.*, *Yarbrough v. Johnson*, 520 F.3d 329, 343 (4th Cir. 2008). The Fifth Circuit has done the same. *See Harris*, 313 F.3d at 244 ("The failure to present such double-edged evidence is not prejudicial."). So has the Supreme Court of Florida. *See Willacy*, 967 So. 2d at 144 ("An ineffective assistance claim does not arise from the failure to

present mitigation evidence where that evidence presents a double-edged sword.").

Other courts have recognized that, by its nature, mitigation evidence often *is* "double-edged," and that this is precisely the point of the evidence – it may *explain* why a defendant engaged in the violent act the jury already has found, or show that the defendant is a troubled or disturbed person, rather than a cold-blooded killer. Thus, by definition, the evidence may suggest that the defendant could engage in a violent act or fail to prevent one from occurring.

For example, in *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004), the Tenth Circuit found prejudice resulting from counsel's failure to present mitigation evidence and held that the district court's refusal to give weight to "double-edged" evidence of brain damage and an abusive childhood – on the ground that it suggested the defendant was "an unstable individual with very little control" over his actions – "reveal[ed] a fundamental misunderstanding of the purpose for which such mitigation evidence would have been presented." *Id.* at 943. As the court explained, "[t]he jury already had evidence of Mr. Smith's impulsiveness and lack of emotional control. What the jury wholly lacked was an *explanation* of how Mr. Smith's organic brain damage caused these outbursts of violence and caused this 'kind hearted' person to commit such a shocking crime." *Id.* (footnote omitted).

Similarly, in *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002), the Eighth Circuit rejected an argument that counsel's failure to present evidence

of the abuse the defendant had suffered as a child was not prejudicial because the evidence could have an aggravating effect, reasoning that "[b]y the time the state was finished with its case, the jury's perception of Simmons could not have been more unpleasant. Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. . . . The jury had already convicted Simmons of murdering McClendon, and we fail to see how disclosures of childhood transgressions would have caused any significant harm." *Id.* at 938-39 & n.6.

Other courts have reached similar results, all directly contrary to the analysis of the Sixth Circuit here. *See, e.g., Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir.) ("Boyde's history of suffering violent physical abuse, as well as the family history of sexual abuse he had known about growing up, is the sort of evidence that could persuade a jury to be lenient."), *amended on reh'g*, 421 F.3d 1154 (9th Cir. 2005); *Outten v. Kearney*, 464 F.3d 401, 423 (3d Cir. 2006) (disapproving a state court's conclusion that the defendant "could not establish prejudice because [his] records contained some harmful information" and because the "mitigating and aggravating information . . . cancel[ed] each other out" (internal quotation marks omitted)); *Turpin v. Lipham*, 510 S.E.2d 32, 39, 42-44 (Ga. 1998) (upholding a finding of prejudice because the defendant's "mental disorders and the abuse, neglect and isolation he experienced as a child were not adequately presented to the jurors," even though trial counsel characterized the evidence as "a loaded gun" that could cause the jury to view Lipham as either a

"poor, institutionalized soul from a neglected background or . . . an outright sociopath who only did things for his immediate gratification").

This divergence in approach has extremely serious implications for the fair and uniform administration of justice, since the very same facts could give rise to a finding of prejudice in many courts (such as the Third, Eighth, Ninth, and Tenth Circuits and the Supreme Court of Georgia), while leading to an inability to prove prejudice in many others (such as the Fourth, Fifth, and now Sixth Circuits, as well as the Supreme Court of Florida). Indeed, if this very case had been decided by a court on the other side of the divide, the outcome would have been different. It is clear that even if the evidence of West's terror-filled childhood somehow were viewed as aggravating beacuse "violence begets violence," a weighing of all of the evidence – including the *mitigating* value of this same evidence – would have provided a sufficient basis for relief in many other courts.

This Court should grant review to resolve this issue. To be sure, this Court already has stated that some aggravating "edge" is not enough to disregard the evidence in the prejudice analysis under *Strickland*. In *Williams*, the Court noted that "not all of the additional evidence" of Williams' childhood "was favorable to Williams," since he had committed a number of crimes as a juvenile. *Williams*, 529 U.S. at 396; *see also id.* at 418-19 (Rehnquist, C.J., dissenting). But the Court nevertheless found prejudice based on the mitigating evidence of childhood suffering that the sentencing jury never heard. *See id.* at 393-96. Further guidance from this

Court is plainly necessary, however, as the deepening divide evidenced by the Sixth Circuit's decision here amply illustrates.

D. The Sixth Circuit's Analysis Of Whether Counsel's Performance Was Deficient Was Infected By Its Erroneous View Of The Insignificance Of Childhood Abuse And Is Inconsistent With Decisions Of This Court.

In ruling on whether counsel were deficient in failing to investigate and discover crucial mitigating evidence about West's turbulent childhood, the Sixth Circuit inexplicably failed to apply this Court's recent decisions governing that issue: *Williams*, *Wiggins*, and *Rompilla*. Instead, the court cited to *United States v. Cronic*, 466 U.S. 648 (1984), and *Burger v. Kemp*, 483 U.S. 776 (1987), cases from over twenty years ago that no longer reflect the state of the law on the extent of counsel's duty to investigate mitigating evidence under the Sixth Amendment. In addition, the court's view of counsel's obligation was inevitably colored by its mistaken belief that the evidence overlooked by counsel in this case was by its nature weak and insignificant.

The law is clear: this Court repeatedly has held that counsel has an obligation to conduct a reasonable investigation into potential mitigating evidence and may not simply rely on what the defendant and his family report, or – as the Sixth Circuit suggested was sufficient here – simply interview "all potential witnesses who [are] called to his attention." Pet App. 22a (quoting *Burger*, 483 U.S. at 794-95) (internal quotation marks omitted);

see Rompilla, 545 U.S. at 389-90. Rather, in assessing the reasonableness of an investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Where "counsel [chooses] to abandon their investigation at an unreasonable juncture," a "fully informed decision with respect to sentencing strategy" is "impossible." *Id.* at 527-28.

Here, counsel failed to pursue obvious red flags, such as the fact that West had no memories of the first ten years of his life, had a history of alcohol abuse, and reacted with physical manifestations of fear and anxiety when describing Martin's commission of the crimes. The Sixth Circuit cavalierly dismissed counsel's failure to follow up on these signals and made no reference to the American Bar Association Standards for Criminal Justice, which *Wiggins* emphasized. *Id.* at 523. Instead, the Sixth Circuit asserted that counsel "did a fair amount of investigation in preparation for the mitigation phase," that it was contested whether West's sister had informed counsel of the abuse, and that Dr. Bursten (who carried out a two-hour competency evaluation and declined to ask West's family any questions about abuse) had not found any problem in West's background.[12] Under this Court's

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[12] The court claimed that *West* was responsible for the lack of additional psychological evaluation before sentencing, because he had objected to submitting to a competency evaluation. But that objection came from West's counsel, not from West, Post-Conviction Hr'g Tr. 203-04, and hardly should count against

rulings that is plainly not the test. Even setting aside whether West's sister told counsel about the abuse, counsel had an obligation to conduct an independent investigation of West's background, rather than rest on the minimal work done here. *See, e.g., Wiggins*, 539 U.S. at 527; Pet. App. 54a-55a (Moore, J., dissenting). There is no dispute that West's trial counsel did not in fact ever discover the substantial mitigation evidence presented at the state habeas hearing – the state habeas court explicitly found that "[n]one [of West's family members] was questioned concerning possible abuse," Pet. App. 420a – and yet that evidence was readily available.

The Sixth Circuit's mistaken approach results from its flawed understanding of what constitutes mitigating evidence. Because the court discounted out of hand the value of the evidence that West's attorneys failed to discover, it is not surprising that the court was unwilling to place much (if any) burden on counsel to unearth and present that evidence. After all, the less valuable the evidence, the less time and energy a reasonable attorney would spend looking for it.

Thus, the issue in this case is whether West is entitled to a new sentencing hearing because of his trial counsel's undisputed failure to investigate and present substantial evidence that West was subjected to severe abuse from the earliest years of his life. This Court already has held that counsel in a capital case has a duty to investigate the

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West in the context of an examination of whether counsel's performance was deficient.

circumstances of the defendant's background, which was not done here. The Sixth Circuit ultimately discarded the significance of the evidence in this case because it hypothesized that a jury might have found it to be aggravating, rather than mitigating. For the reasons set forth above, that decision is both wrong and significant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
09-461 OCT 19 2009
OFFICE OF THE CLERK

No. 09-

IN THE
Supreme Court of the United States

STEPHEN MICHAEL WEST,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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October 19, 2009

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN MICHAEL WEST,
Petitioner-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellee.

Nos. 05-5132, 05-6219.

Argued: Feb. 7, 2008.
Decided and Filed: Dec. 18, 2008.
Rehearing and Rehearing en banc Denied
May 20, 2009*

OPINION

BOGGS, Chief Judge.

Stephen Michael West appeals the district court's dismissal of his petition for habeas corpus filed pursuant to 28 U.S.C. § 2254. West argues that the state trial court erred by refusing to admit two exculpatory pieces of evidence, that the trial was prejudiced by prosecutorial misconduct, and that he received ineffective assistance of counsel during the

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* Judge Moore would grant rehearing for the reasons stated in her dissent.

sentencing phase of his trial. We reject these arguments and affirm the district court.

I. BACKGROUND

A. Factual and Procedural History

1. The crime

We briefly summarize the facts of the two murders that led to West's arrest. On March 17, 1986, twenty-three year-old West and seventeen year-old Ronnie Martin left their jobs at a McDonald's in Lake City, Tennessee. They had known each other only about two weeks. After driving around and drinking in Martin's car for several hours, Martin told West that he knew a girl who would "give them some sex." Martin was referring to fifteen year-old Sheila Romines, a classmate of Martin who had previously rebuffed his advances and embarrassed him in front of other students. Martin and West went to the Romineses' house, but did not approach it. Instead the two laid in wait until around 5:20 A.M., when Mr. Romines left for work. They knocked on the door and Wanda Romines, Sheila's mother, let the two into the house. Sometime between 6:00 A.M. and 8:30 A.M., Wanda and Sheila were brutally murdered. Dr. Cleland Blake, a forensic pathologist, testified that Sheila had been raped prior to being stabbed seventeen times in the abdomen. Fourteen of those wounds were torture-type cuts. Wanda Romines had also suffered a large number of deep stab wounds, including torture-type wounds. West and Martin were arrested the next day.

2. The trial

Both West and Martin were charged with the rape and double homicide, but the trials of the two defendants were severed and the state prosecuted West first. During West's initial criminal trial in the Criminal Court of Union County he was represented by two attorneys: Richard McConnell, who was hired by West's family and was the lead counsel, and Thomas K. McAlexander, a court appointed co-counsel. At trial, the defense argued that though West was present during the murders, Martin was the architect of the crime and that West participated only because Martin threatened to kill him and his then-pregnant wife. Dr. Blake, however, testified that (1) two different knives were used; (2) two people were involved in the infliction of the wounds. Martin did not testify at West's trial. On March 24, 1987, a jury convicted West of two counts of first-degree murder, two counts of aggravated kidnaping, one count of aggravated rape, and one count of larceny.

During the sentencing phase, six people testified on West's behalf. Three of them were family friends who had known West for three, twelve, and fourteen years respectively. The sheriff testified that West had not caused any problems during the year he was incarcerated awaiting trial. West's sister testified that West was the baby in the family and had never been in trouble, and that his mother could not come to court because she had recently suffered a heart attack. West's wife testified that they had a good relationship and that West was a good father to their eleven-month-old daughter. Finally, West himself

testified. He admitted to being present during the crimes but denied that he had participated in the murders of the two victims. He also stated that he had no prior criminal record, had been an honor student in school, and had never had any disciplinary problems. Despite West's mitigating evidence, the jury ultimately sentenced him to death.

West directly appealed his conviction and sentence to the Tennessee Supreme Court. West asserted numerous claims, including prosecutorial misconduct and that the trial court erred in excluding two pieces of evidence. West did not claim ineffective assistance of counsel. On February 6, 1989, the Tennessee Supreme Court rejected all of his arguments. *State v. West,* 767 S.W.2d 387 (Tenn.1989).

3. Post-conviction attack on prosecutorial misconduct and ineffective assistance of counsel

On October 23, 1990, West filed for post-conviction relief in the Criminal Court of Union County, Tennessee. West argued that he received ineffective assistance of counsel during the sentencing phase of his trial because his counsel should have discovered existing mitigating evidence. Judge John K. Byers held evidentiary hearings on September 24 and October 22, 1996. The federal district court and state court of criminal appeals summarized the evidence introduced in the evidentiary hearings, so we review it only briefly here. *West,* No. 3:01-cv-91, slip op. at 17-36; *West v. Tennessee,* 04C01-9708-CR-00321, slip op. at 3-14.

Dr. Eric Engum, a clinical psychologist, conducted a two-day comprehensive psychological and neuropsychological evaluation of West. He testified that the test results did not indicate any signs of brain damage or cognitive compromise and that West's intelligence, memory, and other skills were within normal limits. Dr. Engum also testified that West suffered from chronic, significant depression and that West had a severe mixed-personality disorder with self-defeating, avoidant, dependant, and schizoid features. According to Dr. Engum, West's test results indicated that he was somewhat unstable, moody, changeable, and lacked a strong sense of self. Dr. Engum also stated that West's test results demonstrated that he was withdrawn, introverted, brooding, a loner, and stayed to himself, and also that he had a lot of bottled-up anger. Dr. Engum was asked whether there was any indication that West had been abused as a child. He responded that while there was no test that could "specifically tell what somebody experienced or what events occurred in somebody's life" West's "personality characteristics or behavioral or emotional characteristics" were "consistent with or reflect[ed] prior abuse." *West,* No. 3:01-cv-91, slip op. at 18.

West's oldest sister, Debbie West, testified that West was born on September 16, 1962, in a mental institution in Anderson, Indiana and that her mother abused West. *Id.* at 21. Debbie West described the abuse as follows:

> I can remember when Steve was a baby, and he was kept in the back bedroom, and I would get a whipping for going and giving him a

> bottle. If he cried, he was picked up by one arm and one leg and slammed against the wall to shut him up. If my other brother did something wrong, Steve got beat for it. My sister and I would try to get between them, and we would get beat, and then his beating was finished, and this was not just one or two times. This was from the time I can remember Steve coming home from the hospital.

Ibid. Debbie West also testified that West was slapped in the head, hit with shoes, and received a blow to the head which caused him to become cross-eyed. Debbie West described her father as a violent alcoholic who became more violent when he drank. Finally, Debbie West claimed that prior to West's criminal trial she told West's attorney, Mr. McConnell, about the abuse; however, according to Ms. West, he told her the information about the alleged abuse was not relevant, and that, furthermore, her parents were paying him and would not admit to the abuse.

Two other family members, West's older sister, Patricia Depew, and his aunt Ruby West, also testified as to the abuse West suffered. Patricia was present at some of the meetings with the trial attorneys, but she said that she was never asked about the abuse, and she never offered any information about the abuse. Ruby testified that she was not contacted by the trial attorneys.

McAlexander, West's court-appointed co-counsel, testified that he: (1) did a tremendous amount of research in preparing different motions which were

filed on Petitioner's behalf; (2) met with West many times to discuss all aspects of the case; (3) met with West's family on more than one occasion; (4) met at least thirty-five times with McConnell in preparing for trial; and (5) spent 547.4 hours on West's case. McAlexander also testified that to the best of his recollection, West's sister, did not tell him that West had been abused and that there was nothing that raised "any kind of red flag in my mind about that being a factor that should have been inquired into." *West,* No. 3:01-cv-91, slip op. at 22. McAlexander also explained that while they had hired a mental health expert, Dr. Ben Bursten, to explore West's competency and the possibility of an insanity defense, the court had rejected the defense's request for funds to hire an expert to explore a duress defense. The court ruled that way because the parties had been battling over mental exams and West had previously objected to the trial court's sua sponte ordering of a psychological examination to determine competency. *Id.* at 27. McAlexander stated they talked about using the competency expert's testimony during the sentencing phase, but ultimately decided against using such testimony because Bursten told them that his evaluation could not support the support the conclusion that West had "untoward mental reactions at the time of the offense." *West,* 3:01-cv-91, slip op. at 31.

McConnell, West's privately-retained counsel, also testified. Mr. McConnell testified he was paid a total of $10,000 by Petitioner's family to represent him. In addition, Petitioner's family paid the bills of

a private investigator[1] and the competency expert. McConnell testified that while he did not think $10,000 was a reasonable fee for the case because of its magnitude, he agreed to that fee due to the financial situation of Petitioner and his family. He denied complaining about his fee, but acknowledged he and co-counsel joked about the fact that co-counsel, who was court-appointed, would make more money representing Petitioner than Mr. McConnell, retained counsel. McConnell also admitted that he had contacted the family requesting an additional $5,500 in fees and expense money.

As for McConnell's investigation of West's background, he testified that he conducted a complete investigation into West's life although he had no recollection of obtaining any of West's employment records, birth records, or medical records. The district court noted, however, that the state post-conviction record indicates the defense did file a subpoena requesting Petitioner's school records after the trial was in progress. McConnell also explained that while he interviewed West's family, the only member who was cooperative was West's sister, Debbie. McConnell also denied that Debbie West told him about West's physical abuse and denied that he told her that the abuse was not relevant. He also stated that West, himself, did not mention any physical or sexual abuse. As for the military records, McConnell explained that the

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[1] The investigator was hired to find evidence that Martin was a member of a satanic cult and to prove that Martin had the motive and mental capacity to torture the victims, whereas West did not.

defense team made a strategic decision not to introduce them because the records indicated that West had drug and alcohol problems during his service in Germany.

Attorney Paul Morrow also testified at the state post-conviction hearing as an expert on professional standards. In Morrow's opinion, the alcohol abuse documented in Petitioner's military records was a "red flag or I would say a rocket going off saying that you better look back into that person's history." In addition, it was Mr. Morrow's opinion that West's inability to remember his first ten years of life was a red flag that should have made the trial counsel investigate possible abuse.

The State called Dr. Bursten. Bursten testified that West's description of his father as an alcoholic led him to ask West if he had been abused as a child. West denied any abuse. Dr. Bursten also testified regarding Dr. Engum's report. He agreed that West had an adequate IQ, however, he disagreed, based on the records, including Dr. Engum's report, with the conclusion that West was abused as a child. With regard to Dr. Engum's diagnosis of West's depression and personality disorder, Dr. Bursten explained that while West might suffer from those conditions, their presence would not necessarily indicate that West, at the time of the crimes, was actually under extreme duress.

On April 14, 1997, the Criminal Court denied West's claim of ineffective assistance of counsel. *West v. Tennessee,* No. 629 (Tenn.Crim. Ct. April 14, 1997).

4. Further state appeals and West's federal habeas petition

On May 2, 1996, West appealed the denial of his post-conviction relief to the Tennessee Court of Criminal Appeals. On June 12, 1998, the court rejected his appeal. *West v. Tennessee,* 04C01-9708-CR-00321 (Ct. Crim. App. June 12, 1998). West then filed a petition for rehearing and, when that was denied, an application for permission to appeal to the Tennessee Supreme Court. The Tennessee Supreme Court allowed West to appeal only the issue of whether there was sufficient evidence to establish the aggravating circumstance, but the court ultimately affirmed the denial of post-conviction relief. West then filed for a petition for rehearing, which was denied on June 7, 2000.

On February 20, 2001, West filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Tennessee. The case was subsequently transferred to the Eastern District and assigned to the Honorable Thomas A. Varlan. West asserted 22 grounds for granting his habeas petition. On September 30, 2004, the district dismissed West's petition and denied a certificate of appealability ("COA"). On August 18, 2006, after a series of appeals, this court granted West a COA on four issues:

1. Whether the state court was unreasonable in its determination of the facts or its application of the law when it dismissed petitioner's claim that his counsel rendered in-

effective assistance during the sentencing phase of trial.

2. Whether the trial court improperly excluded the proffered testimony of Libby Wood during the guilt/innocence phase of the trial?

3. Whether the trial court improperly excluded secretly taped conversations between Martin and his cellmate?

4. Whether the prosecutor engaged in various instances of misconduct that prejudiced the outcome of the trial?

II. DISCUSSION

Whether the district court properly dismissed West's § 2554 petition is a question of law that we review *de novo*. *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004). We review the court's factual findings for clear error, except where the factual findings are based on the district court's review of state court trial transcripts or other court records, in which case they are reviewed *de novo*. *Dando v. Yukins*, 461 F.3d 791, 796 (6th Cir. 2006).

This court's review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). We may grant West's habeas petition only if his constitutional rights were violated in the underlying criminal proceedings, 28 U.S.C. § 2254(a), and only if the original or subsequent state court proceedings:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A. Ineffective Assistance of Counsel

1. Procedural default, exhaustion, and fair presentment

West claims that his trial counsel rendered ineffective assistance during the sentencing phase by failing to investigate West's abusive childhood and its effects on his actions and state of mind during the crime. Appellant's Br. 17. West first raised this argument in his initial state post-conviction review. *West v. State of Tennessee,* No. 629 (Crim. Ct. Union County, Tenn. April 14, 1997), slip at 6-7. J.A. 1632-33. Thus, there is no procedural default.

Nevertheless, West attached several pieces of evidence to his federal habeas petition, which the district court did not consider because West failed to present it to the state courts.[2] A writ of habeas cor-

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[2] (1) An affidavit of Dr. Keith Caruso, a psychiatrist who never examined West, but who gave an evaluation of West's competency based records and documents provided to him; (2) an affidavit of Debra West Harless, West's sister; (3) a birth record from Community Hospital; (4) an affidavit of Karen West Bryant, West's former wife; (5) an affidavit of Vestor West, West's father; (6) West's military discharge papers; (7) An affidavit of Patty Rutherford, West's manager at McDonald's; (8) a case

pus may not be granted unless the petitioner has exhausted available state-court remedies. 28 U.S.C. § 2254(b)(1). In order to satisfy the exhaustion requirement, "a petitioner's claim must be 'fairly presented' to the state courts before seeking relief in the federal courts." *Whiting v. Burt*, 395 F.3d 602, 612 (6th Cir. 2005) (citing *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004)). In other words, "the substance of a federal habeas corpus claim must first be presented to the state courts." *Picard v. Connor*, 404 U.S. 270, 278, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971).

Rule 7 of the Rules Governing Section 2254 Cases, however, provides:

> (a) ... [T]he judge may direct the parties to expand the record by submitting additional materials relating to the petition;
>
> (b) ... The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

U.S.C. Sec. 2254 Cases, R7.

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report of Dr. Claudia Coleman, who conducted a clinical interview with West, administered several psychological tests, and reviewed West's case file; and (9) a case report of Dr. Richard Dudley, a psychologist who evaluated West based on records and other materials.

In *Vasquez v. Hillery,* 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986), the Supreme Court held that courts may consider additional affidavits and records so long as "the supplemental evidence presented by [the petitioner] d[oes] not fundamentally alter the legal claim already considered by the state courts...." *Id.* at 260, 106 S. Ct. 617; *see also Richey v. Bradshaw,* 498 F.3d 344, 351 (6th Cir. 2007); *Satterlee v. Wolfenbarger,* 453 F.3d 362, 366 (6th Cir. 2006).

The decision of whether to expand the record, however, is within the sound discretion of the district court. *Ford v. Seabold,* 841 F.2d 677, 691 (6th Cir. 1988). Because the district court did not abuse its discretion in declining to expand the record, we will consider only the evidence presented before the state court during the post-conviction proceedings.

2. Supreme Court precedent governing claims of ineffective assistance of counsel: *Strickland v. Washington*

In *Strickland v. Washington,* the Supreme Court delineated a two-prong test for determining whether a defendant's counsel was so ineffective as to constitute a violation of the defendant's constitutional rights:

> First, the defendant must show that counsel's performance was deficient. This requires that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficiency requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S. Ct. 2052. This court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Id.* at 689, 104 S. Ct. 2052. To establish prejudice, West must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S. Ct. 2052.

The Supreme Court has held that a failure to investigate a defendant's background or present mitigating evidence can constitute ineffective assistance of counsel. *See Rompilla v. Beard,* 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); *Wiggins v. Smith,* 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).[3]

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[3] Though AEDPA constrains the court to look to the law as clearly established at the time of the time the state conviction became final, *Williams v. Taylor,* 529 U.S. 362, 380, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), this court may rely on any later decisions analyzing or explaining the law (as opposed to creating new law). *Strickland* was clearly established well before West's criminal trial concluded in 1987. We can rely on *Rompilla, Wiggins,* and *Williams* because they merely explain *Strickland.*

3. The state courts' determinations of the facts and application of the law

The Criminal Court for Union County, Tennessee was the first state court to review West's petition for post-conviction relief. After holding two evidentiary hearings, the court denied West's petition. In its order, the court explicitly delineated the *Strickland* test for assessing claims of ineffective assistance of counsel, but it also stated an incorrect burden of proof. The court wrote:

> The petitioner contends that he was denied his Sixth Amendment right to the effective assistance of counsel. In order to be granted relief on the grounds of ineffective assistance of counsel, the petitioner must establish that the advice given or the services rendered were not within the range of competence demanded of attorneys in criminal cases and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *If the petitioner fails to prove by a preponderance of the evidence that the result would have been different had counsel acted differently, i.e.,* the prejudice prong, it is unnecessary to address the competency of counsel prong.

West, No. 629, slip at 6-7. J.A. 1632-33 (emphasis added). The correct burden of proof under *Strickland,* however, is "reasonable probability," not preponderance of the evidence. This is a point we

will return to in the discussion below as to whether the state court's *decision* was contrary to *Strickland.* In dismissing West's claim, the court pointed out that there was conflicting evidence regarding the possible mitigation evidence that trial counsel failed to present. The court concluded, "after a thorough review of the overwhelming evidence presented," that West had "failed to meet his burden of proof with respect to the allegations. In particular, [West] has *failed to show how he was prejudiced* by any of counsel's acts or omissions." *Id.* at 7 (emphasis added).

The Court of Criminal Appeals of Tennessee, the second state court to review West's post-conviction began by reviewing the evidence presented at the September 24, 1996, evidentiary hearing held in the court below. It then addressed the authority presented by West in support of his claim of ineffective assistance. In doing so, the court did cite *Strickland,* but not for the particular part of the opinion that delineates the two-part test for evaluating ineffective-assistance claims. The court then adopted the state's argument, including the state's citation to *Lockhart v. Fretwell,* that:

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

West v. State, 1998 WL 309090, *8, 1998 Tenn. Crim. App. LEXIS 636, *22 (Tenn. Crim. App. 1998) (citing *Lockhart v. Fretwell,* 506 U.S. 364, 369-70, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)).

After reviewing the arguments of both West and the State, the court held:

> We agree with the post-conviction court's assessment that "there existed conflicting testimony regarding mitigation evidence that trial counsel failed to present." We also agree with the court that Dr. Engum's testimony reflected that the petitioner's evaluation showed no signs of trauma or organic brain damage. We agree with the post-conviction court that in light of this conflicting evidence, the petitioner did not meet his burden with respect to the allegation of ineffective counsel at the sentencing phase. Regarding all of the ancillary and subissues, after a thorough review, we conclude that the petitioner has failed to meet his burden of proof as to these allegations. We agree with the post-conviction hearing court that the petitioner has failed to show how he was prejudiced by any acts or omissions of counsel.

West v. State, 1998 WL 309090, *9, 1998 Tenn. Crim. App. LEXIS 636, *23-24 (Tenn. Crim. App. 1998).

4. West's habeas claims

West argues that the state courts' rejections of his ineffective assistance claim were contrary to and involved an unreasonable application of *Strickland* because the criminal court relied on the wrong stan-

dard of proof and because the court of criminal appeals erroneously relied on *Lockhart*.

a. AEDPA and the state court's error concerning the burden of proof

Clearly, the Criminal Court for Union County stated the wrong standard for proving prejudice in a claim of ineffective assistance. Moreover, the Supreme Court has used this exact mistake as an example of when a decision would be "contrary to" *Strickland:*

> Take, for example, our decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different,* that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. 2052.

Williams, 529 U.S. at 405-06, 120 S. Ct. 1495 (emphasis added).

While West is correct that his situation satisfies requirements of 28 U.S.C. § 2254(e), we cannot grant habeas unless West is "in custody in violation of the Constitution or laws or treaties of the United

States." 28 U.S.C. § 2254(a). As Justice Stevens put it: "We all agree that state-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated." *Williams*, 529 U.S. at 389, 120 S. Ct. 1495 (Stevens, J., concurring). Though the state court clearly applied an incorrect standard, it reached the correct outcome. A careful review of the record demonstrates that West's counsel was not so ineffective as to constitute a denial of his constitutional rights. For this reason, we must deny West's petition for a grant of habeas corpus even though the state court decision was an unreasonable application of clearly established federal law.

b. West's representation was constitutionally sufficient

On appeal to this court, West emphasizes the following facts as evidence that his attorneys were ineffective:

> (1) Defense counsel interviewed only West, his parents and one sister and that they opted not to conduct separate interviews of the other siblings outside of the presence of West's parents.
>
> (2) While defense counsel hired Dr. Bursten to conduct a mental examination of West to determine his competency and any bases for an insanity-type defense, counsel did not hire a second expert to testify during the mitigation phase.

(3) Counsel failed to investigate West's employment records or interview West's employers.

(4) Counsel failed to introduce West's school records, though apparently they did subpoena them. *West v. Bell*, No. 3:01-cv-91, slip op. at 24 (E.D. Tenn. Sept. 30, 2004).

(5) Counsel did not introduce West's military records.

(6) Defense counsel also failed to subpoena or examine West's medical records.

We are not convinced, however, that all of these are actually errors, let alone errors that rise to the level of ineffective assistance of counsel.

Under *Strickland*, we must give a high level of deference to the defense counsel's decisions; there is also a presumption that counsel was competent:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the diffi-

> culties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689, 104 S. Ct. 2052 (internal citations omitted).

This high level of deference means that we "we address not what is *prudent* or *appropriate,* but only what is *constitutionally compelled." United States v. Cronic,* 466 U.S. 648, 665, n.38, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (emphasis added). In *Burger v. Kemp,* the trial counsel had interviewed "all potential witnesses who had been called to his attention," and, on that basis, decided that "an explanation of petitioner's history would not have minimized the risk of the death penalty." 483 U.S. 776, 794-95, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987). The Court held that the trial counsel's decision "not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment." *Id.* at 794, 107 S. Ct. 3114.

We came to a similar conclusion in *Scott v. Mitchell,* 209 F.3d 854, 881-82 (6th Cir. 2000). Though we noted that Scott's attorneys "would certainly have been well-advised to conduct more research into mitigating factors than they did.... [T]he decision of Scott's attorneys to pursue a residual-

doubt strategy in this case was not objectively unreasonable, because it was adequately (if not ideally) informed and was quite arguably the best course of action available." *Ibid.*

In the case at hand, the most significant alleged error-the failure to adequately investigate West's past abuse-is also the most contested. Debbie West claims she informed McAlexander and McConnell about the abuse, but the attorneys strongly deny that. The two psychologists, Engum and Bursten, disagree over whether West's evaluations contain evidence of abuse; and Bursten testified that West specifically denied being abused.

As for West's other objections, the record demonstrates that West's counsel, in fact, did a fair amount of investigation in preparation for the mitigation phase. West's defense counsel interviewed West's family multiple times. They met individually with West's sister, Debbie, multiple times. They examined numerous historical records. Even if they could not remember doing so (which is understandable considering that ten years had elapsed between West's criminal trial and the post-conviction hearing), the record demonstrates that they subpoenaed West's school records. *West v. Bell,* No. 3:01-cv-91, slip op. at 24 n.10 (E.D. Tenn. Sept. 30, 2004). Indeed, West testified that he had been on the honor roll and in the Beta Club. *Id.* at 15. They also examined West's military record but made a decision not to put it into evidence as the record noted that West had a "pattern of misconduct," though it did not elaborate on what that misconduct consisted of. *Id.* at 27.

The attorneys also investigated West's mental state. Originally, West had been evaluated on motion of the state by a psychologist, Dr. Ford. Not being satisfied with the results, the defense hired Dr. Bursten to determine competency and sanity. As mentioned above, Dr. Bursten's evaluation was not used for the purpose of mitigation. Nevertheless, Dr. Bursten's evaluation did not lead counsel to suspect anything along the lines of the "long-term personality disorder" diagnosed by Dr. Engum nine and a half years after West's trial and conviction. As Mr. McConnell explained, "I had had Mr. West examined by a very competent psychiatrist, Dr. Bursten, who obviously did a thorough history, et cetera, and none of that ever came out." *Id.* at 26. They also requested from the trial court additional funds to hire a second psychologist in order to pursue a possible duress defense to at least the rape (duress is never a defense to murder). The court refused the request on the grounds that West had objected to the trial court's sua sponte ordering of a psychological examination to determine competency. *Id.* at 27. Our circuit addressed a similar situation in *Fautenberry v. Mitchell*, 515 F.3d 614 (6th Cir. 2008). There, the defense counsel had hired an expert for the express purpose of conducting a neuropsychological examination, but the defendant refused to be examined. Our court held that the counsel's "inability to discover or establish organic brain damage is directly attributable to [the defendant's] refusal to cooperate, rather than any insufficiency in the investigation." 515 F.3d at 625. We declined to "find counsel deficient simply because they did not succeed in discovering [the defendant's] brain damage or pursue unspeci-

fied, alternate avenues (which may or may not have revealed the brain damage)." *Ibid.* In this case, West's earlier refusal to submit to examination was the reason the court blocked his request for another examination. Like the defendant in *Fautenberry,* West's lack of cooperation is part of the reason why his counsel did not discover some potentially mitigating evidence.

Finally, we note that even if West could prove that his counsel was ineffective for all of the reasons he cited, he has not shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S. Ct. 2052. West's trial counsel attempted to appeal to the jury's sympathy, decency, and common sense. They attempted to show that West had been a good and decent citizen: that he had never before been in trouble with the law, that he was a veteran who served his country, and that he was a loving husband and a soon-to-be father. The jury was not persuaded. We are not convinced that the school, military, and employment records that West now argues should have been submitted would have affected the jury's verdict.

As for the evidence of the past abuse, it is possible that had West's attorneys discovered it, they might have taken the alternative approach of portraying West as the product of an unstable and abusive home. The jury might have believed that the abuse made West the kind of person who was psychologically unable to confront or disobey strong,

threatening people such as Martin. The jury might have pitied West and chosen to spare his life. However, the very same evidence may have had the opposite effect on the jury. They might have believed that violence begets violence and that West's past abuse made him the kind of person who could have raped and tortured a fifteen year-old girl. They might have despised West and sentenced him to death with greater zeal.

It is not enough for this court to speculate that the jury would have chosen the former path. There must be "a reasonable probability" that the proceeding would have been different. Given the strength of the evidence against West presented at trial and the weakness of the mitigating evidence that West presented during the post-conviction proceedings, we cannot conclude that there was reasonable probability that the jury would have chosen to spare West's life.

B. The Exclusion of Libby Woods's Testimony and the Martin-Hunley Tapes

1. The proffered evidence

West's theory of the case was that it was Ronnie Martin and not West who actually killed Wanda Romines and her daughter, Sheila. In order to demonstrate this, West sought to introduce two pieces of evidence: (1) the testimony of Libby Woods, an acquaintance of both Martin and Sheila; and (2) two taped conversations between Martin and his cellmate, Steve Hunley.

According to West:

> Woods was prepared to testify that Martin said he would kill Sheila Romines; that he was upset with her for embarrassing him on one occasion where Sheila actually struck him in front of other students at school; that he wanted to date her and he wanted to have sex with her and she resisted his advances; and, that Martin said that he owed her, and that is why he would kill her.

Appellant's Br. 6-7.

The two taped jailhouse conversations supposedly demonstrated that Martin was the main perpetrator and that West did not take part in the killings. The first conversation proceeded as follows:

> Hunley: Hey, Ronnie
>
> Martin: Yeah?
>
> Hunley: One more time before I go to bed to ease my mind, Steve [West] do that shit?
>
> Martin: No.
>
> Hunley: Huh?
>
> Martin: No
>
> Hunley: O.K. Thank you.
>
> Hunley: These guys back here don't believe me that you said Steve didn't kill them women. Will you tell them you did?
>
> Unknown: Who's back there?
>
> Hunley: All of us.
>
> Martin: Yeah, I did it.

Hunley: You killed both them women?

Martin: Yeah.

Hunley: Why?

Martin: I don't know. I don't want to talk about it.

In the second conversation, Martin discussed his plan to falsely take an insanity plea. During the conversation he tacitly agreed that he, and not Steve, had killed the Romineses.

Hunley: Yea, but you said Steve didn't kill those women, you did. Don't you think that's crazy?

Hunley: Huh

Martin: Huh

Hunley: You told me Steve didn't do that but you did, don't you think that's crazy?

Martin: I don't think it's crazy, no.

West argues that the state court violated his Sixth, Eighth, and Fourteenth Amendment rights under *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), and *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979), by excluding these pieces of evidence.

2. Procedural default

The State argues that West procedurally defaulted on his claims because he raised them solely as issues of state law before the state courts. We do not agree. While West failed to cite either the United States Constitution or federal case law in his argument concerning Woods's testimony, he did cite

federal law in his argument concerning the taped recordings. Specifically, he cited the Constitution and *Chambers* for the general proposition that, "[t]he right of an accused in a criminal trial is, in essence, the right to fair opportunity to defend against the state's accusations." 410 U.S. at 294, 93 S. Ct. 1038. Furthermore, West concluded the section dealing with both Woods's testimony and the Martin-Hunley tapes by arguing that:

> [West] attempted to introduce several pieces of evidence.... The failure of the trial judge to permit this resulted in a denial of [West's] Due Process rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 7, 8, and 9 of the Tennessee State Constitution.

"A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court ... by citing in conjunction with the claim the federal source of law ... or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin,* 541 U.S. at 32, 124 S. Ct. 1347. Thus, even though West did not raise a constitutional issue in his main discussion of the exclusion of Woods's testimony, he did preserve his federal claim in regard to the exclusion of Woods's testimony by referring to the United States Constitution in the summary of his argument.

The fact that the Tennessee Supreme Court analyzed his claim in regards to Woods's testimony only under state law is irrelevant. A state Supreme Court's failure to analyze a petitioner's federal claim,

"does not deprive this court of jurisdiction." *Newton v. Million,* 349 F.3d 873, 877 (6th Cir.2003); *see also Smith v. Digmon,* 434 U.S. 332, 333, 98 S. Ct. 597, 54 L. Ed. 2d 582 (1978) (per curiam) ("[W]hether the exhaustion requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court....").

3. State-court analysis

In rejecting West's claims in regard to Woods's testimony, the Tennessee Supreme Court reasoned that testimony of Libby Woods was distinguishable from the excluded evidence at issue in *Green v. State,* 154 Tenn. 26, 285 S.W. 554 (1926), and *Hensley v. State,* 28 Tenn. 243 (1848)-the two state court decisions on which West based his arguments. The state court reasoned that (1) the testimony at issue in West's case would be attributed to a *co-defendant* so that any such proof would be cumulative where the State concedes the co-defendant's guilt and (2) West's defense that "his participation was commanded at gun point by Martin would not have been corroborated by the excluded evidence." *West,* 767 S.W.2d at 396.

The state court also rejected West's argument as to exclusion of the Martin-Hunley tapes. *Ibid.* In *Chambers,* the Court reasoned that because the facts of the underlying crime tended to prove that there was only one perpetrator, any confession that implicated another party tended to also exculpate the defendant. In West's case, however, the evidence

was consistent with there being two perpetrators. Thus, any evidence implicating Martin did not necessarily exculpate West.

The state court also raised concerns about corroboration and reliability. *Ibid.* The tapes were not recorded by jailhouse personnel. Rather they were made by an unknown inmate or inmates, without Martin's knowledge. West acquired the tapes through Ken Holt, a private investigator. Holt swore in an affidavit that he had acquired the tapes from Byron Bryan, Steve Hunley's attorney.

The court concluded that the tapes were properly excluded because: (1) unlike the defendant in *Chambers,* Martin was unavailable to the State or the defendant because he would have invoked the privilege against self-incrimination (a statement confirmed by West's attorney, who had spoken with Martin's attorney); (2) the record was completely silent as to whether the tape recordings were corroborated; and (3) *Chambers* does not require the admission of uncorroborated hearsay statements against penal interest. *See West,* 767 S.W.2d at 395-96.

4. West's habeas claims

In order for West to succeed on his claim he must demonstrate that the state court decision "(1) ... was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or (2) ... was based on an unreasonable determination of the facts...." 28 U.S.C. § 2254(d). The relevant federal

law was articulated by the Supreme Court in *Chambers*

In *Chambers,* the issue was whether the trial court erred in preventing the defendant from introducing three witnesses, each of whom would have testified that another person had confessed to being the actual shooter of the victim. The trial court excluded proffered testimony as inadmissible under Mississippi's hearsay rule, which totally excluded hearsay statements against penal interest. Because the state's theory was that there was only a single shooter, the proffered testimony would have directly contradicted the state's argument that Chambers was that shooter. 410 U.S. at 298, 93 S. Ct. 1038. It also would have directly exculpated him by pointing to another suspect as the shooter. In holding that Chambers's due process rights were violated the Court wrote:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of

> trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id. at 302, 93 S. Ct. 1038 (internal citations omitted).

i. Libby Woods's testimony

As noted above, the state court did not analyze the exclusion of Woods's testimony under federal law. Thus, the state cannot defend the decision as a reasonable application of federal law. Nevertheless, the decision might still be *contrary* to federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law .... [or] if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that of the Supreme Court. *Williams,* 529 U.S. 362, 405-06, 120 S. Ct. 1495.

The state trial court, as with the trial court in *Chambers,* excluded Woods's testimony as inadmissible hearsay. Both parties agreed that the statement was actually hearsay and if it were to come in, it would have to be admitted under one of the hearsay exceptions. The trial judge asked West's attorney if he was offering the statement to prove the truth of the matter asserted. West's attorney did not address that question, but stated that he "would of-

fer those statements against penal interest for the jury's deliberations as to whether or not my client is guilty of this particular murder."

The Tennessee Supreme Court, in reviewing the trial court's decision to exclude Woods's testimony, emphasized the cumulative nature of the evidence-that is, because the state had conceded that Martin was also a participant in the murders, Woods's testimony that Martin intended to kill Sheila Romines did not refute the State's theory nor did it exculpate West. Furthermore, the testimony shed no light on West's theory that he was either under duress or was being dominated and forced by Martin to commit the murders. Though the state court did not consider *Chambers*, had it done so, there would have been more than adequate ground to distinguish Woods's testimony from the type of testimony at issue in *Chambers*. Thus, the Tennessee Supreme Court's decision in regard to Woods's testimony was not contrary to *Chambers*.

ii. Martin-Hunley tapes

In reviewing the trial court's decision to exclude the Martin-Hunley tapes from the guilt/innocence phase of the trial,[4] the Tennessee Supreme Court ex-

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[4] The trial judge ruled that West could introduce the Martin-Hunley tapes at the *sentencing* phase (in accordance with *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979)). However, the trial judge cautioned that if West admitted those tapes, he would also allow the State to introduce recordings of Martin's statements to the police, which implicated West. West subsequently chose not to introduce the tapes during the sentencing phase.

plicitly applied *Chambers*. Thus, the question is whether it unreasonably applied *Chambers* or arrived at a conclusion contrary to *Chambers*.

The state court again focused on the fact that the Martin-Hunley tapes were cumulative evidence and did "not exonerate [West], who was present, participating, aiding and abetting and his defense that his participation was commanded at gun point by Martin would not have been corroborated by the excluded evidence." *West*, 767 S.W.2d at 396. The court also noted that in *Chambers*, the would-be declarant, McDonald, was available for cross examination, whereas the would-be declarant in West's case, Martin, was unavailable to the State or to West because Martin invoked his Fifth Amendment rights. Thus, the Tennessee Supreme Court had adequate grounds to distinguish the Martin-Hunley tapes from the evidence in *Chambers*. The decision, therefore, was neither contrary to or an unreasonable application of *Chambers*.

C. Prosecutorial Misconduct

West alleged several instances of prosecutorial misconduct grouped into four categories: (1) the prosecutor deliberately misinformed the jury that the law was "self-executing" and that choosing or not choosing the death penalty was not their responsibility; (2) the prosecutor claimed that defense counsel was attempting to deceive or mislead the jury; (3) the prosecutor called West a liar and expressed his personal belief that West was a liar; and (4) the prosecutor asserted inflammatory facts not supported by the

evidence. We address the first category of alleged misconduct separately, and the last three jointly.

1. The role of the jury in determining a capital sentence

a. The alleged misconduct

West objected to the following statements made by the prosecutor during closing argument:

> The decision you are going to be called upon to make obviously is very serious, it is one of the most serious you will ever make. But, on the other hand, if you will listen to what the Judge tells you the law is, you will see that it is not necessarily a difficult decision in that sense. In the application of the law. Because the law provides certain guidelines, certain perimeters within which you are to consider the verdict, your secondary verdict in this case.
>
> ....
>
> See, the law in Tennessee, and the law of the land, in this sense, is self-executing, in the sense that the law mandates, requires a death sentence in certain situations, unless it is outweighed by other factors.
>
> The law is clear. Your responsibility once again is to weigh proof, to make a finding of fact, apply the applicable law to those facts and the law provides the punishment, not you, not you. You do not set punishment in this case, per se. You make decisions based upon fact and the law, self-executing, based upon your weighing the facts.

...

> Was [the mitigating evidence] enough to outweigh torture, the depravity, the atrociousness, and all of the other things the State contends it has shown? See. You have to weigh them. That is your function. And if the State tips the scales and proves those things to you beyond a reasonable doubt, and what you heard for the defendant today doesn't outweigh this ... then the penalty is death. That is the law. That is the law.
>
> As the law states, and the Judge will tell you this, once the State proves aggravating circumstances, one or more, beyond a reasonable doubt, if they are not outweighed by mitigating circumstances the defendant shows you, the punishment shall be death. That is a matter of law. It is a matter of law.
>
> I am not going to stand here and tell you that that is an easy application of the law, because it is not. It is a difficult application. But, just keep in mind, you don't impose the sentence, the law provides the sentence, you are merely finders of fact.
>
> ...
>
> In this case, the State feels like justice in its purest form, once again, would be best served by the administration of the law.

West argues that these comments were constitutionally impermissibly under *Caldwell v. Mississippi*,

472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

b. State-court analysis

In *Caldwell,* the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 105 S. Ct. 2633. On direct appeal, the Tennessee Supreme Court addressed West's claims and agreed that the statements were inappropriate:

> We agree that the district attorney's statements that "the law is self-executing", that the law "provides the punishment, not you", and the concluding statement that "you don't impose the sentence, the law provides the sentence, you are merely finders of fact", violate *Caldwell.* Such statements minimize the jury's role and allows [sic] them to feel that the responsibility for a death sentence rests elsewhere.

West 767 S.W.2d at 399. The court then analyzed whether the violations were harmless, and determined that they were:

> We are of the opinion that the three or four brief erroneous characterizations of the jury's role in determining the appropriateness of a death sentence were sufficiently corrected by the trial judge and the accurate portions of the district attorney's and the defendant's arguments stressing the proper responsibility of

> the jury. These clarifying measures contrast sharply with the situation in *Caldwell* ... where the trial judge endorsed the prosecutor's remarks. Thus we find that the errors were harmless beyond a reasonable doubt.

Id. at 399-400.

c. West's habeas claims

Because the Tennessee Supreme Court concluded that the prosecutor's statements during closing arguments did violate *Caldwell*, but were nevertheless harmless, the relevant "clearly established federal law" is both *Caldwell* and the harmless error rule of *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). *See Fry v. Pliler*, 551 U.S. 112, 127 S. Ct. 2321, 168 L. Ed. 2d 16 (2007); *Wilson v. Mitchell*, 498 F.3d 491, 503 (6th Cir. 2007). *Brecht* requires a court to ask "whether the error had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637, 113 S. Ct. 1710 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)).

The comment made by the prosecutor here is distinguishable from the comments at issue in *Caldwell*. In *Caldwell*, the prosecutor told the jury that the responsibility for determining the appropriateness of a death sentence did not rest with them but rather with the appellate court which would later review the case. *See* 472 U.S. at 325, 105 S. Ct. 2633. Additionally, the judge also told the jury that its decision would automatically be reviewed by the State Supreme Court. *Ibid.* By contrast, the prosecutor in this case clearly told the jury that it was the prosecu-

tor's duty to prove aggravating factors and the jury's duty to weigh the evidence and then decide if there were aggravating factors and if those factors were outweighed by any mitigating circumstances. The judge also instructed the jurors that it was their duty to fix West's punishment as either death or life imprisonment and that each one must decide whether any mitigating circumstances were sufficiently substantial to outweigh the aggravating circumstances.

The Tenth Circuit reviewed a set of comments similar to the ones challenged here in *Parks v. Brown,* 860 F.2d 1545 (10th Cir. 1988) (en banc), *rev'd on other grounds sub nom. Saffle v. Parks,* 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990). There, the prosecutor told the jury:

> But, you know, as you as jurors, you really, in assessing the death penalty, you're not yourself putting Robyn Parks to death. You just have become a part of the criminal-justice system that says when anyone does this, that he must suffer death. So all you are doing is you're just following the law, and what the law says, and on your verdict-once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just part of the criminal-justice system that says that when this type of thing happens, that whoever does such a horrible, atrocious thing must suffer death.
>
> Now that's man's law. But God's law is the very same. God's law says that the murderer

> shall suffer death. So don't let it bother your conscience, you know.

Parks, 860 F.2d at 1549. The Tenth Circuit concluded "that *Caldwell* is inapplicable here because 'none of the [prosecutor's] comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process.'" *Parks,* 860 F.2d at 1550 (quoting *Darden v. Wainwright,* 477 U.S. 168, 184 n.15, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)).

The prosecutor's comments in *Parks* were more akin to the comments in this case than were the comments at issue in *Caldwell.* In *Parks,* as here, there was no erroneous statement that appellate review relieves the jury of its obligations. Indeed, the prosecutor's comment in *Parks* that the decision to sentence a man to death is "not on your conscience" may be more troubling than the prosecutor's comments at issue here. Furthermore, as both the state court and the district court noted, the trial judge corrected the statements that allegedly minimized the jury's role. *West,* 767 S.W.2d at 399-400; *West,* No. 3:01-cv-91, slip op. at 78. For these reasons we hold that it was not unreasonable, under *Caldwell* and *Brecht,* for the Tennessee Supreme Court to conclude that the prosecutorial error in regard to minimizing the role of the jury did not have a "substantial and injurious effect or influence in determining the jury's" imposition of West's capital sentence.

2. The prosecutor: claimed that defense counsel was attempting to deceive or mislead the jury; called West a liar; and made inflammatory remarks not supported by the evidence

a. The alleged misconduct

West alleges that during his closing argument, the prosecutor told the jury that the defense counsel was attempting to mislead or confuse the jury on eleven separate occasions. Of those eleven instances, ten involved variations of the phrase "[t]hat is an attempt to blow a little smoke in your eyes," or "[a]nother attempt to throw a little sand in your eyes." In the eleventh instance the prosecutor referred to one of defense counsel's arguments as an "attempt that defense counsel has made in this case, in order to confuse you...."

West also objected to statements made during the prosecution's closing in which the prosecutor called West a liar. "Now you are a gifted liar, Mr. West. You are not just a liar...." West also objects to several other statements made during closing arguments:

> * Can you believe that he had the audacity to say that Sheila Romines consented to have sex with him ... the most ludicrous, cruel lie that has ever been told in Union County history.
>
> * I guess the truth is not important, at least to Mr. West.

* He said that Ronnie [Martin] took the knife and killed both women. We know that that is a lie. We know that that is a lie.

Finally, West argues that the prosecutor made the following inflammatory comments not supported by the evidence:

* [I don't] know whether West or Martin, or both, had taken anything other than alcohol.

* Are we going to turn Stephen West loose, let him escape from responsibility for the crimes that he has committed, because he and Mr. Martin were able to successful dispose of the murder weapons or successfully wash the blood off the murder weapons.

* [A]fter the butchery, [West and Martin] go in and clean themselves up before they leave.

West objects to several comments in which the prosecutor speculated as to Martin and West's actions during the commission and cover-up of the crime, arguing that they were not supported by the record. We do not repeat them all here as they are explored in detail in the district court opinion. *West,* No. 3:01-cv-91, slip op. at 117-20.

b. Procedural default and fair presentment

The State argues that West procedurally defaulted in challenging the first and third sets of statements by failing to raise them in the state court proceedings as "federal constitution violations." Appellee's Br. 43. While it is true that West cited only state law in those arguments, there are other ways

in which he could have fairly presented his constitutional claim to the state courts. *See Baldwin,* 541 U.S. at 32, 124 S. Ct. 1347. As we stated in *McMeans v. Brigano,* 228 F.3d 674 (6th Cir. 2000):

> This court has noted four actions a defendant can take which are significant to the determination whether a claim has been "fairly presented": (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law.

Id. at 681.

West's allegations in regard to the first set of statements were sufficiently particular and well within the mainstream of constitutional law. West specifically stated that the prosecutor's comments about defense counsel attempting to mislead the jury were "highly prejudicial and improper." He used the same phrase in objecting to the prosecutor's statements that were allegedly unsupported by the record. Though this statement was not close to an invocation of the Supreme Court's standard for judging prosecutorial misconduct, it was evocative of language that we articulated in *United States v. Leon,* 534 F.2d 667 (6th Cir. 1976). As we stated in *Leon,* we evaluate claims of prosecutorial misconduct using four factors, including "whether the remarks tended

to mislead the jury or to *prejudice* the accused." *Id.* at 679. *See United States v. Carroll,* 26 F.3d 1380, 1384 (6th Cir. 1994) (explaining *Leon*). Indeed, in *Leon,* the court found that the remarks at issue were "improper and highly prejudicial," *Leon,* 534 F.2d at 678, the very same phrase used by West. As for West's arguments about the second set of statements, West quoted from *State v. Smith,* 456 A.2d 16 (Me. 1983), explicitly noting that the state case was citing a federal case, *United States v. Gonzalez Vargas,* 558 F.2d 631 (1st Cir. 1977). West also cited *United States v. Bess,* 593 F.2d 749 (6th Cir. 1979). We accordingly hold that West fairly presented his federal claims to the state court and that he is not procedurally barred from pursuing those claims here.

c. State-court analysis

The state court analyzed West's claim under state law, relying on *State v. Buck,* 670 S.W.2d 600, 609 (Tenn. 1984) and *State v. Beasley,* 536 S.W.2d 328 (Tenn. 1976), which held that a prosecutor's argument should be supported by evidence introduced at trial and the reasonable inferences to be drawn from that evidence and that a lawyer's personal opinion as to the credibility of a witnesses should not be injected into argument. However, as the state court noted, *Beasley* cited with approval a number of cases in which the courts refused to find misconduct when the prosecutor's reference to a "lying" defendant or defense witnesses was supported by evidence in the record. *West,* 767 S.W.2d at 394.

The court ultimately found that some of the prosecutor's references had "borderline support" and

could "through reasonable inference [ ] be drawn from evidence" and that some were not based upon evidence or proper inferences therefrom. For example, the comment that he didn't "know whether Mr. West or Mr. Martin, or both, had taken anything other than alcohol," was unsupported. *Id.* at 394-95. The state court also acknowledged that, under state law, it was "improper for the district attorney to tell the jury that defense counsel was 'trying to throw sand in the eyes of the jury' and 'blowing smoke in the face of the jury.'" *West,* 767 S.W.2d at 395. The court dismissed the weight of the improper comments, however, holding that "viewed in the context in which the improper remarks occurred and in light of the overwhelming evidence of defendant's guilt the instances of prosecutorial misconduct were harmless beyond a reasonable doubt." *Ibid.*

d. West's habeas claims

Again, the issue is whether the state court decision was contrary to or an unreasonable application of clearly established federal law. Under the relevant Supreme Court precedent, prosecutorial misconduct is grounds for reversal if that conduct " so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden,* 477 U.S. at 181, 106 S. Ct. 2464 (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). The appropriate standard for review on a claim of prosecutorial misconduct alleged in a petition for a writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Donnelly,* 416 U.S. at 642, 94 S. Ct. 1868. "We do not possess supervisory powers

over state court trials." *Byrd v. Collins*, 209 F.3d 486, 529 (6th Cir. 2000) (citing *Cook v. Bordenkircher*, 602 F.2d 117, 119 n.5 (6th Cir. 1979), for the proposition that "it is the responsibility of the [state courts] to police their prosecutors; we have no such authority."). As we explained in *Byrd:*

> In making this determination, we must bear in mind that the touchstone of due process analysis ... is the fairness of the trial, not the culpability of the prosecutor. Therefore, even if the prosecutor's conduct was undesirable or even universally condemned, it does not constitute a due process violation unless the conduct was 'so egregious so as to render the entire trial fundamentally unfair.' Indeed, our case law demonstrates the extreme nature of prosecutorial misconduct required for a federal court to issue the writ.

209 F.3d at 529 (internal citations and quotation marks omitted).

It is improper to personally attack defense counsel or argue that counsel is attempting to mislead the jury. *Broom v. Mitchell*, 441 F.3d 392, 412-13 (6th Cir. 2006). A prosecutor should not give his own opinion as to the credibility of witness. *Hodge v. Hurley*, 426 F.3d 368, 378-79 (6th Cir. 2005); *see also Caldwell v. Russell*, 181 F.3d 731, 737 (6th Cir. 1999) ("Ordinarily, a prosecutor may not express a personal opinion concerning the guilt of the defendant or the credibility of trial witnesses, because such personal assurances of guilt or vouching for the veracity of witnesses by the state's representative exceeds the

legitimate advocate's role by improperly inviting the jurors to convict the defendant on a basis other than a neutral independent assessment of the record proof."); *United States v. Carroll*, 26 F.3d 1380, 1387-89 (6th Cir. 1994); *United States v. Dandy*, 998 F.2d 1344, 1353 (6th Cir. 1993).

Nevertheless, this does not mean that the prosecution cannot attack the defendant's credibility or even assert that the defendant is lying. As we explained in *United States v. Francis*, 170 F.3d 546 (6th Cir. 1999):

> This Court has held that a prosecutor may assert that a defendant is lying during her closing argument when emphasizing discrepancies between the evidence and that defendant's testimony. To avoid impropriety, however, such comments must reflect reasonable inferences from the evidence adduced at trial. Again, misconduct occurs when a jury could reasonably believe that the prosecutor was, instead, expressing a personal opinion as to the witness's credibility.

Id. at 551 (internal citations and quotation marks omitted).

Assessing West's claims therefore is a two-step process. First, the court must determine whether a prosecutor's conduct and remarks were improper. Second, the court must determine whether the conduct warrants habeas relief. The four factors considered when evaluating whether relief is warranted are:

(1) "the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused;"

(2) "whether they are isolated or extensive;"

(3) "whether they were deliberately or accidentally placed before the jury;" and

(4) "the strength of the competent proof to establish the guilt of the accused."

Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997).

The Tennessee Supreme Court used a similar set of factors from *Buck* in assessing West's claims on direct appeal. The *Buck* factors are:

(1) "the conduct complained of viewed in context and in light of the facts and circumstances of the case;"

(2) "the curative measures undertaken by the Court and the prosecution;"

(3) "the intent of the prosecutor in making the improper statement;"

(4) "the cumulative effect of the improper conduct and any other errors in the record;" and

(5) "the relative strength or weakness of the case."

670 S.W.2d at 609.

Though the Tennessee Supreme Court did not walk through each of the factors, it clearly applied them. The district court gave a more detailed analysis of the alleged misconduct. Both courts came

to the conclusion that the misconduct did not amount to reversible error. We agree.

While it is true that the prosecutor asserted his personal opinion as to West's credibility, the error was harmless given the evidence submitted to the jury that West had contradicted himself on numerous occasions and had given varying accounts of crimes. The same is true for the prosecutor's comments that defense counsel was intentionally misleading the jury. As the district court pointed out, the state's closing argument took up thirty pages of trial transcript. While there were eleven instances of inappropriate comments, none were lengthy; they were all short asides.

As for the comments allegedly not supported by the record, many of them were actually supported. For example, West complains of the prosecutor's speculation about West and Martin cleaning the murder weapon. However, one of West's statements to the police was read to the jury by Agent Scott. In that statement West had stated, "I wiped off the guns and took them to the mother's bedroom." J.A. 1732. The district court opinion explores more of the allegedly-unsupported statements, demonstrating that many of the inferences were based on testimony and evidence in the record and we need to repeat the analysis here.

Moreover, even if every statement was not fully supported, the comments at issue could hardly be said to have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S. Ct. 2464.

Accordingly, we affirm the district court's denial of relief on prosecutorial misconduct.

III. CONCLUSION

The district court's denial of West's petition for habeas corpus is AFFIRMED.

KAREN NELSON MOORE, Circuit Judge, dissenting in part and concurring in the judgment only in part.

After paying mere lip-service to recent Supreme Court precedent, the majority in this case applies a pre- *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), interpretation of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), standard for ineffective-assistance-of-counsel claims. Because I conclude that, under the *Strickland* standard as explained in *Wiggins* and *Rompilla*,[1] West has met his burden of proof for his claim of ineffective assistance of counsel at the penalty phase, I respectfully dissent.

The majority correctly states that, to prove ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. The majority then correctly concludes that the state courts' applications of *Strickland* and *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), were contrary to or involved an unreasonable application of established Federal law. However, the majority then cites

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[1] Because *Rompilla* and *Wiggins* merely explain the *Strickland* standard and do not establish new law, it is appropriate to rely on those cases when deciding West's ineffective-assistance-of-counsel claim "even though those cases were decided after [West's] convictions became final." *Jells v. Mitchell*, 538 F.3d 478, 491 n.2 (6th Cir. 2008); *see also Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003)

Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987), for the proposition that counsel need not "mount an all-out investigation into petitioner's background in search of mitigating circumstances [if the decision] was supported by reasonable professional judgment." Majority Op. at 555 (quoting *Burger*, 483 U.S. at 794, 107 S. Ct. 3114). Applying this law, the majority holds that "West's counsel, in fact, did a fair amount of investigation in preparation for the mitigation phase," and thus West has not shown ineffective assistance of counsel. Majority Op. at 555-57.

The majority's opinion ignores both recent Supreme Court cases that have explained the standard applied to claims of ineffective assistance of counsel under *Strickland* and Sixth Circuit precedent. Under *Strickland*, failure reasonably to investigate a defendant's background and to present mitigating evidence at sentencing can amount to ineffective assistance of counsel. *Wiggins*, 539 U.S. at 522, 123 S. Ct. 2527 (noting counsel has an "obligation to conduct a thorough investigation of the defendant's background" before making tactical decisions regarding what mitigating evidence to present) (quoting *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). The court must consider whether a reasonable attorney, given the same evidence as the counsel in question, would have investigated something further. *Wiggins*, 539 U.S. at 527, 123 S. Ct. 2527 ("In assessing the reasonableness of an attorney's investigation, however, a court *must consider* not only the quantum of evidence already known to counsel, but also

whether the known evidence would lead a reasonable attorney to investigate further.") (emphases added). Further, counsel cannot simply rely upon information the defendant and his family provided. *See Rompilla,* 545 U.S. at 389, 125 S. Ct. 2456 (requiring counsel to review a prior-conviction file rather than rely solely on statements made by the defendant and his family). As this circuit has repeatedly held, counsel has an independent duty to investigate mitigating evidence, even if the defendant is reluctant. *Harries v. Bell,* 417 F.3d 631, 638 (6th Cir. 2005); *Hamblin v. Mitchell,* 354 F.3d 482, 492 (6th Cir. 2003); *Coleman v. Mitchell,* 268 F.3d 417, 449-50 (6th Cir. 2001); *Carter v. Bell,* 218 F.3d 581, 596-97 (6th Cir. 2000).[2]

Applying the *Strickland* standard, I conclude that it is clear that West has met his burden. Several pieces of evidence demonstrate that West's counsel was deficient. First, Jerry Summers ("Summers") and Paul Morrow ("Morrow"), two seasoned attorneys who had tried several capital cases, testified during the post-conviction hearing that counsel was deficient in this case. J.A. at 1674, 1677 (Tenn. Ct. Crim. App. Op. at 10, 13). Second, West's sister testified at the post-conviction hearing that she informed counsel of West's childhood abuse and that counsel told her that it was not relevant. Third, Summers testified that two facts should have raised red flags to counsel that West may have suffered abuse: (1) the fact that West was born in a mental

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[2] The majority does not cite any of these binding Sixth Circuit cases in its opinion.

hospital and (2) West's statement that he had no memories before the age of ten. J.A. at 1673-74 (Tenn. Ct. Crim. App. Op. at 9). West's counsel ignored these key pieces of evidence that would have led a reasonable attorney to investigate further. Thus, I conclude that West's counsel was deficient.

I further conclude that West was prejudiced by this deficiency. To prove prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S. Ct. 2052. In this case, had counsel presented evidence of abuse and its effects on West, it is extremely likely that at least one juror would have determined that West's explanation for what happened to him while the crime took place-essentially that he froze-was plausible, making the death penalty unwarranted. As summarized by the Tennessee Court of Criminal Appeals, Morrow "testified that the prejudice that was shown in this case was that the jury did not hear the 'psychological or lay witnesses that would have made somewhat comprehensible his actions on that day [day of the murders].'" J.A. at 1677 (Tenn. Ct. Crim. App. Op. at 13) (alteration in original). Further, if money had been available originally for doctors, Dr. Coleman's and Dr. Dudley's evidence of West's psychological makeup would have been provided, in addition to the various witnesses who could have spoken about West's childhood abuse.[3]

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[3] The majority contends that West's objection "to the trial court's sua sponte ordering of a psychological examination to

Finally, though Dr. Bursten testified at the post-conviction hearing that West stated during their interview that he had not been abused, the relevance of such evidence is questionable for two reasons. First, Morrow testified during the post-conviction hearing that West's statement to Dr. Bursten was not necessarily reliable because often defendants who have truly been abused are "the worst person to talk to" about the abuse "because he or she is usually embarrassed or does not understand its significance." J.A. at 1676 (Tenn. Ct. Crim. App. Op. at 12). Second, the fact that West stated that he was not abused is not dispositive when a wealth of evidence points to the conclusion that he was abused. *See, e.g., Coleman,* 268 F.3d at 450 ("'The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility.' ") (quoting *Carter v. Bell,* 218 F.3d 581, 596 (6th Cir. 2000)).

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determine competency" resulted in the trial court later denying West's counsel funds for experts and led to counsel's failure to discover mitigating evidence. Majority Op. at 555. The majority cites *Fautenberry v. Mitchell,* 515 F.3d 614 (6th Cir. 2008), for the proposition that West's "lack of cooperation" in some way hinders his current claim of ineffective assistance of counsel. Majority Op. at 555-56. *Fautenberry* is distinguishable from this case. There, the defendant refused to be examined by the expert charged with discovering brain impairments relevant to mitigation. *Fautenberry,* 515 F.3d at 625. In this case, West did not object to any examination aimed at discovering ailments pertinent to mitigation, only to an examination focused on the issue of competency.

Counsel's failure to present this evidence of abuse was prejudicial because it would have served to mitigate the prosecution's theory that West stabbed the victims, allowing the jury to believe both (1) Dr. Evans's interpretation that only one person made the stab wounds instead of Dr. Blake's interpretation that two people stabbed the victims, *State v. West*, 767 S.W.2d 387, 392 (Tenn. 1989), and (2) that, even though West was physically larger than Martin, he was mentally unable to stop Martin from stabbing the victims. This evidence would have changed West's mitigation case from one about West's character as "a good and decent citizen," "never before ... in trouble with the law," "a veteran," and "a loving husband and a soon-to-be father," Majority Op. at 556, to one that actually explained why West behaved the way that he behaved. As in *Rompilla*, "[t]his evidence adds up to a mitigation case that bears no relation" to the mitigation case actually presented by counsel. *Rompilla*, 545 U.S. at 393, 125 S. Ct. 2456.

The majority claims that, although the jury may have believed West's evidence and "chosen to spare his life," the jury may also have been unswayed by the evidence. The majority concludes that "[i]t is not enough for this court to speculate that the jury would have chosen the former path." Majority Op. at 556. This statement flies in the face of Supreme Court precedent:

> [A]lthough we suppose it is possible that a jury could have heard [all the evidence] and still have decided on the death penalty, *that is not the test.* It goes without saying that the

> undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing.

Rompilla, 545 U.S. at 393, 125 S. Ct. 2456 (emphasis added) (internal quotation marks and citations omitted); *see also Harries*, 417 F.3d at 640. Therefore, I conclude that, taken as a whole, West's evidence provides "a reasonable probability" that the result of the proceeding would have been different. Thus, I would hold that West has proven ineffective assistance of counsel at the penalty phase of his trial, and I would **REVERSE** the judgment of the district court regarding the penalty phase. With respect to the guilt phase issues addressed by the majority, I concur in the judgment only. Thus, I would **GRANT** a conditional writ of habeas corpus with respect to the penalty phase.

Appendix B

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF TENNESSEE
at KNOXVILLE

STEPHEN MICHAEL WEST,	)	
Petitioner,	)	No.: 3:01-cv-91
v.	)	(Varlan/Shirley)
RICKY BELL, WARDEN, Riverbend Maximum Security Institution,	)	
Respondent.	)	September 30, 2004

Memorandum Opinion

Stephen Michael West ("West" or "Petitioner"), a death-sentenced inmate at the Riverbend Maximum Security Institution in Nashville, Tennessee, brings this petition for writ of habeas corpus against the Warden, Ricky Bell ("Respondent" or "State"), pursuant to 28 U.S.C. § 2254 [Doc. 40, p. 111].[1] West is petitioning this Court "for a writ of *habeas corpus* declaring unconstitutional and invalid his convictions for first degree murder and his resulting death sentences" [Doc. 111, p. 1]. Before the Court is Respondent's motion and memorandum for summary

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[1] Petitioner has filed both a petition and an "amended petition." The "amended petition" appears to incorporate the claims in the original petition. Hence, the Court will refer to the issues as they appear in the amended petition.

judgment [Doc. 124 & 125][2] and Petitioner's response to the motion for summary judgment of the amended petition [Doc. 144]. After carefully considering arguments of counsel and the applicable law, the Court will GRANT Respondent's motions for summary judgment.

I. FACTUAL BACKGROUND

On March 24, 1987, Petitioner Stephen Michael West was convicted by a jury in the Criminal Court of Union County on two counts of first degree murder, two counts of aggravated kidnaping, one count of aggravated rape, and one count of larceny; all of which were committed on March 17, 1986. On March 24, 1987, at the conclusion of the sentencing hearing, the jury found the following three aggravating circumstances supported the imposition of the death penalty for each premeditated murder:

(1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;

(2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;

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[2] Respondent filed both a motion and memorandum of law for summary judgment [Doc. 65 & 66] to dismiss Petitioner's original petition and a motion and memorandum of law for summary judgment to dismiss the amended petition [Doc. 124 & 125]. Since Petitioner's amended petition incorporated the claims which were in the original petition, the Court will refer to the motion to dismiss the amended petition [Doc. 124 & 125].

(3) the murder was committed while the defendant was engaged in committing ... first degree murder, ... rape, ... [or] kidnapping.

The jury determined that death should be the punishment for West on the two counts of first degree murder; and on appeal, the Tennessee Supreme Court affirmed the convictions and sentences. The following is a summary of the evidence.

A. Facts Introduced During Trial

In summary, the State's proof was that on March 17, 1986, Jack Romines left home at approximately 5:20 a.m. to go to work [Addendum 8, p. 52]. His wife was awake and his daughter was still in bed when he left for work. At some time between 6:00 am. and 8:30 a.m. on that date, his wife, Mrs. Wanda Romines (hereinafter "Mrs. Romines"), and their fifteen year old daughter (hereinafter "Miss Romines"), were brutally murdered in their home in the Big Ridge Community of Union County after the women admitted Petitioner and an acquaintance of his, Ronnie Martin ("Martin" or "co-defendant"), into their home.[3] Miss Romines was raped prior to being murdered. Mr. Romines discovered the brutal scene, as described below, upon his return from work and had his neighbor contact law enforcement [Addendum No. 11, pp. 61-69].

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[3] Petitioner apparently had no prior acquaintance with the Romines family but his co-defendant, Martin, knew the victims and had apparently dated the fifteen year old daughter in the past [Addendum 3 (2 of 4), pp. 543-46].

Mrs. Romines was found dead in her bedroom which was in total disarray. There were clothes lying all over the floor and a big box of clothes that had been sitting on a table was turned upside down. A large five foot tall plant had numerous limbs cut off and most of them were in the floor. The window shades on the two windows in the room were closed. Mrs. Romines was found lying in the bed, face down into a pillow with a pair of brown pants wadded over her face, and the only clothing she had on was a red and black checked flannel shirt. A high-powered rifle and a shotgun were hanging in the gun rack on the opposite wall. Ammunition for the weapons was located in the drawer of the gun rack. Mrs. Romines had numerous stab wounds to her back, sides, and waist area in addition to two gaping wounds on either side of her waistline. Her hands had been bound at the wrists but the drawstring that had restrained her wrists had been separated [Addendum No. 10, pp. 113-115].

In Miss Romines's room a drawer was missing from the center of her dresser and other drawers were pulled out. There was a toothbrush on her chest of drawers which appeared to have toothpaste on it as if someone had been brushing their teeth and had just laid it down. Miss Romines's bedroom had two windows. One shade was completely drawn closed, and the other shade was only drawn halfway. There was a large blood stain on the top quilt of the bed and some blood drippings or smears from Miss Romines on the edge. Miss Romines was lying dead on her left side and was wearing a sweater and a pair of panties that were badly blood-stained. There

was blood on her thighs and hands and holes in the front of her sweater. Underneath Miss Romines's body was a blood soaked gown and newspaper, and next to her head was a pillow without a pillow case [Addendum No 10, pp. 115-117]. Mr. Romines's pistol, which was kept in his daughter's room in the bottom drawer of a cabinet wrapped in an old sock, was missing [Addendum No. 11, pp. 61-69].

Other physical evidence at the scene included a towel lying between the table and front door. Near the stove there was a vacuum cleaner, and the cord, had been cut at the plug end. There was a small pan between the eyes of the stove which contained two eggs and some water, in addition to a blender containing milk and an instant breakfast [Addendum No. 10, pp. 111-113]. A bank envelope and piece of paper were found in the kitchen sink, and a couple of drawers on the side of the sink were left opened. Mr. Romines testified that some knives and approximately $200.00 were missing from his house after this crime.

Coming out of the kitchen into the hallway toward the bedrooms, a live .22 shell was found to the left of the door frame going into the bathroom. Inside the bathroom was a lady's hair curler which was on, and a hairbrush, toothpaste, towel, and what appeared to be blood diluted with water were on the edge of the sink [Addendum No.10, p. 113].

Down the hallway, past the bathroom, was a little foyer-type area going into Mrs. Romines's bedroom. Miss Romines's bedroom was located nearby and to the rear of her bedroom was a room

which appeared to be used as a storage area. There was a table with a telephone on it, but the wire had been broken in two where phone calls could not be received nor could calls be made [Addendum No.10, p. 114].[4]

Authorities received information through a confidential informant that led them to John Allen ("Allen"). As a result of information that Allen provided, authorities recovered an unloaded gun[5] a gym bag, some knives, a white glove, and a pillow case which were identified as being taken from the Romines residence [Addendum No. 10, pp. 121-124]. As a result of the information and evidence obtained from Allen, authorities obtained a warrant for Martin, and he was arrested during the early morning hours of March 28, 1986 [Addendum No. 10, p. 124]. After speaking with Martin, authorities obtained a warrant for Petitioner and arrested him [Addendum No. 10, p. 127].

Petitioner gave several different versions of the sequence of the events which transpired prior to the commission of these murders. The discrepancies in the statements are important to the extent they demonstrate why the jury did not find Petitioner credible when testifying that Martin forced him at gunpoint to participate in these crimes [Addendum

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[4] The phone company was called during the initial investigation to come out and patch the telephone so the Union County Sheriffs Department could be called [Addendum No. 10, p. 114].

[5] The .3 8 caliber revolver was identified as belonging to Jack Romines [Addendum No. 10, p. 122].

No. 11]. The facts discussed below are taken from Petitioner's statements and testimony.

Petitioner supervised Martin at McDonald's in Lake City, Tennessee where they were both employed. The two had known each other for a couple of weeks prior to committing these crimes. In addition to working together, they had smoked marijuana together on a least one occasion prior to March 17, 1986 [Addendum No. 10, p. 81]. Petitioner had no prior acquaintance with the victims in this case, but Martin knew the victims and had apparently dated the fifteen year old victim in the past [Addendum No. 3 (2 of 4), pp. 543-46]. Consequently, according to Petitioner, Martin knew where the Romines family lived, what "their habits were, when they would getup, when the young lady's light would go on, and where her bedroom was [located]" [Addendum No. 11, p. 31].

On March 17, 1986, Petitioner and Martin left work together during the early hours. Martin drove them around in his mother's vehicle while they drank beer and talked [Addendum No. 10, pp. 79-81]. As they drove around, Martin told Petitioner he knew a girl who would have sex with them [Addendum No. 10, pp. 82-83].

After driving around and drinking for a few hours, Petitioner and Martin went to Petitioner's house. Petitioner changed clothes out of his McDonald's uniform and took three bottles of beer out of his refrigerator. As he was leaving his wife woke up and he told her he was going fishing [Addendum No. 11, p. 10]. Then Martin drove them

to the house of John Allen, a friend of Martin's, where Martin obtained a butcher knife [Addendum No. 11, pp. 28-38]. This occurred at approximately 4:00 a.m., and Petitioner said he stayed in the car and was not aware that Martin obtained a butcher knife from Allen [Addendum No. 11, p. 30].

During this time, Petitioner and Martin drove by the Romines house several times waiting, according to Petitioner, for the lights to come on [Addendum No. 11, p. 83]. On one occasion, they were turning around in the driveway of a neighbor and Martin backed into a ditch. According to Petitioner, before they eventually got the vehicle out of the ditch the neighbor came out cussing at Petitioner about using the fence post to pry the car out of the ditch [Addendum No. 11, pp. 11-12].

Petitioner and Martin continued to drive by the Romines house and its vicinity until they noticed the lights were on in the house [Addendum No. 11, pp. 12, 86]. They stopped at the house after Mr. Romines had departed for work [Addendum No. 11, pp. 86-67], and Petitioner testified they parked at the corner house near the victims' residence [Addendum No. 11, p. 86].

In his first statement, Petitioner claimed Martin introduced him to Miss Romines, and Martin sat on the "couch with her for about fifteen to twenty minutes talking and feeling of her and whispering something to her. The girl just got me [West] by the hand and asked me if I wanted to go in the back with her. We went into the bedroom, back one on the left, she started playing with me. She wore braces and

was having her period. We had sex then went back to the living room. Ronnie and the girl went back for a couple of minutes and came back out. Ronnie and the girl and myself talked for a while, she got - she gave me a kiss goodbye. We left and got out of the house." [Addendum No. 10, p. 82]. Petitioner stated Martin went back in the house to get some money and stayed for about a half hour and returned with a small gray bag. Petitioner stated he and Martin then drove to Martin's house, and to explain their tardiness, Martin told his mom the car had broken down. Martin gave his mother $5.00 for gas, and she dropped them off at McDonald's at about 9:00 a.m. [Addendum No. 10, pp. 81-83].

Petitioner later had his mother contact Agent Pressnell and tell him that Petitioner wanted to talk to Pressnell again to tell his side of the story. On this occasion, Petitioner made his second statement to Agent Pressnell. Petitioner told Agent Pressnell he was afraid that Martin's friend would kill his wife and mother, and that Petitioner had seen the part of the video where Martin was putting all of the blame on him. Petitioner then proceeded to tell Agent Pressnell that Martin had held a gun on him and forced him to have sex with the young victim. Petitioner stated Martin held a knife and gun on all three of them. According to Petitioner, Martin made the young victim have sex with Petitioner by making her sit on top of him and the mother was forced to have oral sex with him. Petitioner said he enjoyed the sex. Petitioner further stated that Martin killed both women with a knife. According to Petitioner, when they were leaving the crime scene Martin told

Petitioner to go and get the car and if he ran, Martin would kill Petitioner's wife before he could get home. Martin showed Petitioner that he had knives, a gun, a pillow case, and shells in the bag he carried out of the Romines house [Addendum No. 10, pp. 101-02].

At some time after 4:00 p.m. on March 18, 1986, after Petitioner had given Agent Pressnell a second statement, Agent Scott also talked with West a second time. The second statement Petitioner made to Agent Scott was similar to the second version he gave to Agent Pressnell but also included some additional facts. For example, Petitioner said Martin knocked on the Romines's door and after the door was opened Martin pulled a knife and asked where the money was and made all the parties go into the back room. Petitioner claimed Martin made him lie on his back on the bed in the mother's bedroom, and Martin made Miss Romines pull Petitioner's pants down and perform fellatio on him. He achieved an erection and Martin made Miss Romines get on top of him; while they were having sexual intercourse Martin attempted to have anal intercourse with Miss Romines. Petitioner said Miss Romines screamed out and Martin said he could feel Petitioner's penis inside Miss Romines while Martin was having anal intercourse with her.[6] Petitioner claims Martin had

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[6] Dr. Blake, the Union County Coronor who performed the autopsy on the victims, testified there was no penile penetration of the young victim's anus. He supported his opinion with the fact that there was no smearing of feces or material in the rectum and no dilatation of the anal ring, in addition to the fact that there was no stretching of the anal ring

anal intercourse with Miss Romines for several minutes, and then told Miss Romines to get off Petitioner and perform fellation on him and forced her mother to lick his scrotum. Petitioner said he knew Miss Romines was having her period because of the blood on him after they had intercourse. Petitioner revealed that during part of this time Martin would leave the room and go into other parts of the house hunting for things. Martin returned with a gray bag with items in it and two more knives. Petitioner said he was forced to participate in these crimes because he was afraid of Martin who was armed with knives and a gun [Addendum No. 10, pp. 134-36].

Petitioner also revealed that he and Miss Romines went into the living room while Martin remained with Mrs. Romines in her bedroom. Petitioner heard Mrs. Romines cry out and Martin hollered at Petitioner and Miss Romines to come back to the bedroom. Petitioner and Miss Romines went into the bedroom and Miss Romines started crying. Martin was stabbing Mrs. Romines while her hands were tied behind her. Petitioner claimed Mrs. Romines, Miss Romines, and he were all crying and Martin threatened Petitioner with a gun at different times during the ordeal. Martin took Miss Romines out of the room and left Petitioner in the bedroom with Mrs. Romines. Petitioner said he could not find a pulse but he kept hearing noises from her [Addendum No. 10, pp. 128-138].

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and no hemorrhage or deposits to indicate there had been a sexual assault on the anus [Addendum No. 9, p. 57].

Martin called out for Petitioner to come to him and he found Miss Romines and Martin in her bedroom. Miss Romines was lying on her back and her hands were "joined behind her" and Martin was stabbing her [Addendum No. 10, p. 138]. Miss Romines was screaming, and Petitioner said he faced down the hallway so he would not have to watch the murder. Miss Romines started kicking Martin and rolled off the end of the bed. Petitioner said Martin handed him the knife to stab Miss Romines telling him since Martin had killed the mother, Petitioner had to kill Miss Romines. However, Petitioner claimed he kept throwing the knife down on the bed or on the floor refusing to do so. According to Petitioner, Martin got down on his knees and started stabbing Miss Romines as she was begging him and asking him why. Petitioner stated that Martin continued stabbing her in the stomach area and was pushing the handle back and forth like he was trying to torture her or hurt her real bad and make her feel a lot of pain. Petitioner stated he did get blood on his hands, and his prints might be on the knives.

Petitioner further stated that Martin had gathered up some rifles and shotguns and laid them on the couch in the living room but decided not to take them, so Martin gave Petitioner a pair of cotton gloves with blood stains on them and told Petitioner to put the gloves on, wipe the guns off, and put the weapons back in the gun rack. Petitioner explained that he had put two guns in the rack, and when he started to put the third one in, Martin stopped him and told him that one belonged behind the door. Petitioner told the agent that they both left through

the back door, Petitioner went to the vehicle, Martin walked through the woods, and Petitioner then picked Martin up. They drove to Martin's house where he gave his mother $5.00 for gas, and she then drove them to the McDonald's in Lake City, Tennessee. Petitioner claims Martin left McDonald's and came back with a person Martin said would kill Petitioner's wife and mother if Petitioner told anyone about this incident [Addendum No. 10, pp. 138-141].

A third statement was provided by Petitioner wherein he provided more facts and details. In this statement, Petitioner disclosed that Martin had obtained the gun from somewhere in the Romines house and that Martin also possessed a Kouton knife. In addition, Petitioner claimed that Martin put a gun between his eyes and threatened him. Petitioner also added that as Martin stabbed Miss Romines he told her "he owed her" [Addendum No. 11, pp. 12-17].

There were also variances between Petitioner's statements and his trial testimony. During his trial, Petitioner testified he and Miss Romines were sitting on the couch talking when she gasped after seeing Martin walk out of the back of the house with his arm around her mother's neck leading her at knifepoint to the living room. Petitioner claimed he asked Martin if he was crazy and what he was doing, but he testified he did not try to stop Martin because Martin could have stabbed Mrs. Romines at that time.

In this version of the facts, Petitioner said Martin told them all they were going to the back to

have some fun. Martin allegedly pushed the mother, they all fell on each other, and once they all sat up on the bed, Martin was not there. Petitioner claimed he went looking for Martin and found him coming toward him carrying a pistol and two knives. Martin ask Petitioner if Petitioner was looking for him and told Petitioner to follow him to the back room. Martin told Miss Romines to take her clothes off and pull Petitioner's pants down. Petitioner testified as in his previous statement about the sex act, but added that Martin was cutting the tree in the room, calling Miss Romines names, and saying she liked it and other things. Martin told them to go to the living room, and they all followed him in there. According to Petitioner, Martin told Petitioner and Miss Romines to sit on the couch but when Miss Romines complained she was on her period, Martin allowed her to put her panties and gown on. Martin had his arm around the mother's waist, the gun in his hand, and talked about the situation being fun. Martin made them all watch Miss Romines go to the bathroom and then took the mother back to her room and bound her hands. Martin told Petitioner and Miss Romines if they did anything or called anyone, he would kill them.

Petitioner stated Miss Romines was talking like nothing else was going to happen; then Martin came back and took Miss Romines, saying he was going to tie her up, and if Petitioner did anything or called anyone he would kill them. Petitioner testified he sat on the couch in a daze for awhile, then he walked back and saw that Mrs. Romines was dying or dead. Martin came in and took Petitioner to Miss

Romines's room where she was on the bed with her hands tied behind her. Miss Romines got up on her knees and looked at Petitioner and asked him to please not let Martin do this. Petitioner thought Martin punched her, she fell back on the bed, and blood was coming out of her stomach. Petitioner stated he fell to his knees and prayed.

Petitioner claims Martin told him to go back to the mother's room. While in Mrs. Romines's bedroom, Martin cut the rope and handed Petitioner the knife telling Petitioner to cut-up Mrs. Romines. Petitioner claimed he could not do it. His testimony about the killing of Miss Romines was basically the same as previous statements, except Petitioner added that Martin was tasting the parts coming out of her stomach. When asked why he did not try to stop Martin, Petitioner stated he could not do anything. Petitioner claimed that when he was on the floor in Miss Romines's room, Martin put the gun between Petitioner's eyes and said, "I ought to just kill you." Later, while Petitioner was working at McDonald's, Martin allegedly came in and told Petitioner if he had any bright ideas that there was a person standing in the front of McDonald's that would kill Petitioner's wife. Petitioner testified he later learned the individual was John Allen.

Petitioner claimed that he had planned to talk to the police the next day, but the police came to him before he had the chance. Petitioner was arrested approximately twenty-four hours after these crimes were committed [Addendum No. 11, pp. 92-113]. Petitioner admitted that when he was arrested he lied and said Miss Romines voluntarily had sexual

relations with him. When the prosecutor questioned Petitioner at trial about telling a story which in effect assassinated the character of Miss Romines, Petitioner responded that he did not mind taking part of the blame for what he had done, but there was no way he was going to tell them about Martin. However, when the prosecutor reminded Petitioner that he had implicated Martin when he stated that Martin went back inside to get some money and stayed about a half hour, Petitioner denied saying it [Addendum No. 11, pp. 124-25].[7]

B. Facts Introduced During the Sentencing Phase

The jury returned a verdict finding Petitioner guilty of two counts of first degree murder, one count of aggravated rape, two counts of aggravated kidnapping, and one count of grand larceny [Addendum No. 13, pp. 53-55]. The State relied upon the evidence already presented in its case in chief during the guilt/innocence phase to support the imposition of the death penalty [Addendum No. 13, pp. 56]. Petitioner presented character witnesses on his behalf during the penalty phase of his trial.

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[7] Petitioner testified about other things such as the fact that he completed basic training and had training in firearms during the three years he served in the army as a combat engineer [Addendum No. 11, pp. 126-130]. Petitioner denied making the first statement to Agent Scott, but admitted that part of the second statement Agent Scott testified about was correct, but he claimed he was forced to sign the statement without being allowed to read it first [Addendum No. 11, pp. 137-39].

Ms. Harmon, a friend of Petitioner's, testified he was quiet, trustworthy, a role model to her fourteen year old son, and was like one of the family [Addendum No. 13, p. 94]. Petitioner had lived at Ms. Harmon's house after he was discharged from the service for two or three months. Ms. Harmon testified she never saw him angry and that he must have been a good student because he was a good person [Addendum No. 13, pp. 93-96].

Petitioner's next witness was Mary Ruth Nelson, who had known him for approximately twelve years. Ms. Nelson, whose daughter had casually dated Petitioner, testified Petitioner seemed like a quiet sweet boy and that she had no knowledge of Petitioner ever being violent or in any trouble [Addendum No. 13, pp. 96-97]. Next, Amanda Lee Hatmaker, a nineteen year old female who had known Petitioner for approximately four years, testified that Petitioner was a real nice, sincere, and sensitive person. Ms. Hatmaker testified they were very close friends and that she had no knowledge of his ever being in trouble [Addendum No. 13, pp. 98-99].

Petitioner's oldest sister, Deborah Adams, testified that Petitioner was the baby of the family and was never in trouble. Mrs. Adams testified there were no problems between Petitioner and the rest of the family as far as discipline problems and that he had earned good grades while in school. Petitioner had lived with Mrs. Adams and her husband for awhile during his high school years and for awhile after he was discharged from the army. Petitioner's sister testified he was never in any trouble and never

committed any acts of violence [Addendum No. 13, pp. 100-103].

Sheriff Earl Loy testified Petitioner had not given the jail personnel any major problems during the year he was incarcerated awaiting trial Sheriff Loy also testified that except for a few days when he had a cellmate, Petitioner had been housed in a cell by himself [Addendum No. 13, pp. 105-07].

Petitioner's wife, Karen West, testified she had given birth to their daughter while Petitioner was incarcerated awaiting trial. Mrs. West testified Petitioner was a good husband and father. When questioned by the prosecutor about a conversation she previously had with Agent Pressnell in the presence of the prosecutor, Mrs. West was vague when asked whether she recalled stating she had seriously considered leaving her husband and going home to her parents in Ohio because they were having problems. She apparently recalled saying she was a good Christian person before she met Petitioner but denied any recollection of stating that her life had been a nightmare since she married him [Addendum No. 13, pp. 113-114]. Mrs. West said Petitioner was the best thing that had ever happened to her, but her life had deteriorated since she quit going to church. When asked about some letters that were found when the house was being searched, Mrs. West denied indicating that Petitioner might have been seeing someone else. Mrs. West testified her husband had not been seeing anyone, but was writing to a friend of his. Mrs. West further testified she did not recall any letters being found or any

discussion about any letters during the search [Addendum No. 13, pp. 107-115].

The State presented rebuttal proof with the testimony of TBI Agent Ray Pressnell. Agent Pressnell testified about his conversation with Mrs. West and his observations of letters Mrs. West showed him which were either written by Petitioner to another female, or to Petitioner from another female. Agent Pressnell also testified that a small lockbox was found under a bed. Mrs. West told Pressnell that $30.00 was missing from the lockbox, and she stated West was the only one who could have taken it, or she thought Petitioner had taken it. Mrs. West also told him that her life had gone downhill since she had met and married Petitioner. Mrs. West had mentioned getting a divorce and going back to her parents in Ohio while talking with Agent Pressnell [Addendum No 13, pp. 125-28].

Mrs. West was then recalled by Petitioner to rebut Agent Pressnell's rebuttal testimony. Mrs. West testified she never said she was going to divorce her husband. However, Mrs. West testified her intentions were to leave Lake City with her husband because it was a depressing town. Mrs. West stated that at the time she was talking to Agent Pressnell, she was close to having a nervous breakdown, and that Mr. Sexton comforted her with a discussion about the Bible and scriptures [Addendum No. 13, pp. 133-36].

During his sentencing hearing, Petitioner testified he had no prior criminal record and during school he was on the honor roll, in the Beta Club,

and never really had any problems. Petitioner testified he joined the army and after basic training was promoted to corporal and trained the next group of men that came in for basic training. He was stationed at Fort Lewis, Washington, and in Germany. Petitioner testified he received letters of commendation in addition to being on the international Reagan march team. According to Petitioner, he had a good relationship with his family, and although he was incarcerated, they all still loved each other [Addendum No. 13, pp. 115-118].

On cross examination, Petitioner testified that he had dropped out of high school to join the army. Although Petitioner denied killing the victims, he testified he exercised bad judgment and acted like a coward [Addendum No. 13, pp. 118-121].

C. Facts Introduced During the State Post-Conviction Hearing

Some additional facts not introduced during trial or sentencing were introduced by Petitioner during his state post-conviction hearing [Addendum No. 25 & 26].[8] Petitioner also introduced documents allegedly constituting material exculpatory and mitigating evidence, which he claimed the State illegally suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

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[8] Additional facts were introduced by Petitioner to support his claim that his trial counsel were ineffective for failing to fully inform the jury of his complete mental health history.

Dr. Engum, a clinical psychologist, testified on Petitioner's behalf during his state post-conviction hearing. Dr. Engum visited Petitioner at River Bend on December 12 and 13, 1995, and conducted a two-day comprehensive psychological and neuropsychological evaluation [Addendum No. 25, pp. 73-74]. Dr. Engum testified the test results did not indicate any signs of brain damage or cognitive compromise and that Petitioner's I.Q. was within normal limits. Petitioner's memory was in normal limits and his other skills were intact. Dr. Engum testified about two diagnostic impressions. First, he testified Petitioner suffered from a long-standing fairly significant depression. Second, he testified Petitioner had a long-standing severe mixed personality disorder and that the mixed personality disorder included self-defeating, avoidant, dependant, and schizoid features [Addendum No. 25, pp. 90-92].

According to Dr. Engum, Petitioner's tests results indicated a person who was somewhat unstable, moody, and changeable. The term used was "ego dysfunction," which means he did not have a strong sense of self. The person is not authoritative, not secure in himself, not focused toward life goals; and generally, people who have significant ego dysfunction have been in less than optimal home environments. The test results demonstrated Petitioner was not particularly sociable, outgoing, or socially sophisticated. According to Dr. Engum's interpretation of the test results, Petitioner was withdrawn, introverted, brooding, a loner, and stayed to himself.

In addition, the test indicated Petitioner had bottled up anger. Although Dr. Engum testified he could not state the following with a reasonable degree of psychological certainty because he did not have other corroborating test results, Dr. Engum stated he did find evidence to indicate Petitioner's anger came from early childhood experiences [Addendum No. 25, pp. 93-95]. Dr. Engum testified:

> Instead of externalizing that anger, Mr. West keeps it bottled up to himself. That anger is somewhat threatening to him. He keeps it under wraps, and that's one of the reasons why he is very remote and withdrawn. Under particular extreme levels of stress, that anger, the results suggest, may do one of two things. It may either explode, or it may cause, what we call, depersonalization, dissociation, even becoming more remote and withdrawn.

[Addendum No. 25, p. 95].

Dr. Engum testified these personality traits indicate someone who would not have strong leadership ability and who would be more submissive and more easily controlled and more dominated to a degree. Dr. Engum testified Petitioner would have been functioning at no higher than a level of a fifteen year old. According to Dr. Engum, Petitioner scored very low on the dominance scale which assesses whether a person is assertive, resourceful, and has poise. Dr. Engum also testified Petitioner scored low when measured for his capacity for dominance [Addendum No. 25, pp. 96-97]. Dr. Engum testified

Petitioner could be easily dominated [Addendum No. 25, p. 98].

Dr. Engum was asked whether there was any indication in the tests he administered that Petitioner was subject to any abuse as a child. Dr. Engum responded to the questions regarding whether Petitioner was subject to any child abuse as follows:

> I have to answer that question in two ways. I have to tell you that there's no test which can specifically tell what somebody experienced or what events occurred in somebody's life. Testing just can't do that.
>
> What the test can do is reflect whether their personality characteristics or behavioral or emotional characteristics [sic] which may be consistent with or reflect prior abuse, and the answer to that question is yes.
>
> There are two very significant elevations on the MMPI on the hypochondriasis and hysteria scales. Both of those scales measure one's sense of bodily integrity. When you see elevation in those two scales together, what you see is people who are having a history of being scared — they are threat sensitive. They have a history of either physical malady, pain or abuse, something which causes physical pain, and they are constantly searching their environment seeking to mitigate or

disrupt anything that can pause pain. These are people who — I think that's the best way to say it.

[T]he elevations on the hypochondriasis and hysteria scales where there is this great deal of threat, this fear of loss of physical functioning, and it can come from one of three hypothesized sources.

And we know that he has no active medical conditions. We know that he has no past physical disabilities or injuries so it increases the likelihood of him having been subjected to physical abuse. Obviously that would have to be corroborated by other sources.

Mr. West was defined as suffering a depressive disorder, not otherwise specified, very succinctly it means there are a number of elements of depression, but not of sufficient quantity or severity to warrant a diagnosis of major depression. In other words, you may see some of the criteria, but you don't see all of them.

... Axis two basically deals with what we talked about, the medium in which the pathology grows, and that's this mixed personality disorder, and again, Mr. West has a number of personality characteristics. There's no one that is dominant, but you will see elements of

> schizoid, avoidant, self-defeating, and dependent characteristics....
>
> Axis three is basically history provided by him. You will note that I use the word potential history. Again, Mr. West can provide no definitive information of his childhood experiences before age ten, so it's potential. I don't have independent corroboration.
>
> Axis four essentially deals with psychosocial stressors. It's those stresses that are actively impinging upon the patient at the time of the evaluation, and I have listed them there as incarceration, his estrangement from his family, his high levels of social isolation, some of it self imposed, and his involvement in the appeal process. All of those are active stressors in his life.

[Addendum No. 25, pp. 100-14].

According to Dr. Engum, Petitioner suffered from an extreme emotional disturbance because he "is not put together very well psychologically. You have somebody who is remote, withdrawn, ... socially isolated, who does not perform or operate very well under extreme levels of stress or distress." [Addendum No. 25, p. 114]. Dr. Engum testified Petitioner was likely to become dysfunctional, almost depersonalized during high levels of stress and threat. Dr. Engum opined that based on his understanding of the events of the double homicide, Petitioner was in an extreme situation and that he

became essentially dysfunctional during that time [Addendum No. 25, p. 114].

On cross examination Dr. Engum testified that the actual psychological testing identified the personality, behavioral, or emotional characteristics that allow one at least to say there is the possibility that Petitioner suffered from early childhood abuse. However, the testing cannot specifically identify that a particular event happened; the allegations of early childhood abuse need to be corroborated by other sources [Addendum No. 25, pp. 131-32]. A Competency Evaluation Dr. Engum considered when preparing his report indicated Petitioner alleged that his mother, who died in 1987, told him he was abused as a young child. Dr. Engum stated Petitioner had no recollection of events before the age of ten. Additionally, Petitioner never said he was abused as a child [Addendum No. 25, pp. 133-38].

The following colloquy took place between the state post-conviction court and Dr. Engum:

COURT: Now, since I have interrupted, I'm going to ask one more question, is it unusual for a person not to be able to recall the first ten years of their life?

DR.: That is unusual. You typically don't remember the first three to four years of your life, maybe up to age five, but after that, you do remember events. There's controversy. If you read my report, ... understand that repressed

memory is a very controversial issue in my field, okay? I'm just recounting the general position of psychologists in my field that when you see that, you have to question the presence of past physical, mental or sexual abuse.

COURT: In other words, it's your professional opinion that when a person cannot recall from an age where they should be normally able to recall that it makes you consider whether there was abuse during that time?

DR.: Yes, sir. ...It does not confirm it.

[Addendum No. 25, pp. 138-155].

When the state post conviction court told Dr. Engum the court's understanding was that Dr. Engum was not saying Martin, the co-defendant, dominated Petitioner during the commission of the crimes, Dr. Engum responded that he was saying there is a likelihood that could have happened, but he was not making that statement [Addendum No. 25, pp. 155-56]. Dr. Engum admitted it would be important to know the co-defendant's psychological makeup to determine whether Petitioner was dominated by Martin. Dr. Engum also conceded that if Martin had a similar type of psychological makeup as Petitioner and both of them were subject to being dominated, then his opinion would be undermined [Addendum No. 25, p. 156].

Petitioner's oldest sister, Debbie West, testified that Petitioner was born on September 16, 1962, in a mental institution in Anderson, Indiana.[9] Ms. West testified "Steve was thrown against the wall from the time he was born" [Addendum No. 25, p. 164] In addition, according to Ms. West, Petitioner was slapped in the head, hit with shoes, and received a blow to the head which caused him to become cross-eyed [Addendum No. 25, pp. 159-164]. Ms. West described the abuse as follows:

> I can remember when Steve was a baby, and he was kept in the back bedroom, and I would get a whipping for going and giving him a bottle. If he cried, he was picked up by one arm and one leg and slammed against the wall to shut him up. If my other brother did something wrong, Steve got beat for it. My sister and I would try to get between them, and we would get beat, and then his beating was finished, and this was not just one or two times. This was from the time I can remember Steve coming home from the hospital.

[Addendum No. 25, p. 166].

Ms. West described her father as a violent man who became more violent when he drank. He was an

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[9] In March of 1987 when she testified during the sentencing hearing, Ms. West, who was born in December of 1957, identified herself as Deborah Adams [Addendum No. 13, p. 100].

alcoholic who began drinking at the age of ten. According to Ms. West, when Petitioner was young he would flinch when anybody came toward him, and when one of his parents raised a hand, he would duck or act scared. Ms. West had no contact with Petitioner for ten years prior to the time she testified at the state post-conviction hearing. Ms. West claimed that prior to trial she told Petitioner's counsel, Mr. McConnell, about the abuse; however, according to Ms. West, he told her the information about the alleged abuse was not relevant, and that, furthermore, her parents were paying him and would not admit to the abuse [Addendum No. 25, pp. 166-68].

On cross examination Ms. West testified she did not know the year Petitioner was knocked cross-eyed because she was a small child, but she assumed it was around 1964. Petitioner allegedly had surgery to correct his crossed eyes in 1969 in Cleveland, Ohio. She could not remember the treating physician or any details, but she testified she did remember putting medicine in his eyes after the surgery. When the court asked her if Petitioner stayed cross-eyed for five years, her response was not responsive to the question [Addendum No. 25, pp. 158-180].

Thomas K. McAlexander, Petitioner's trial court-appointed co-counsel, testified that he did a tremendous amount of research in preparing different motions which were filed on Petitioner's behalf. According to Mr. McAlexander, he met with Petitioner on numerous occasions to discuss the motions filings and various other aspects of the case. Mr. McAlexander met with Petitioner's family on

more than one occasion. Mr. McAlexander handled the suppression motion, motion for new trial, and the appeal. Mr. McAlexander and co-counsel Richard McConnell met at least thirty-five times preparing for Petitioner's trial, and Mr. McAlexander spent 547.4 hours on Petitioner's case [Addendum No. 25, pp. 192-97].

Mr. McAlexander testified that to the best of his recollection Petitioner's sister, Ms. West, did not tell him Petitioner had been sexually abused and if anything was mentioned about physical abuse, "there was nothing that created any kind of red flag in my mind about that being a factor that should have been inquired into" [Addendum No. 25, pp. 198-99]. Mr. McAlexander had no recollection of Petitioner ever complaining of child abuse or abuse affecting his eyesight and requiring surgery. According to Mr. McAlexander, Ms. West was the most cooperative family member and gave him information about Petitioner's background. Mr. McAlexander testified that neither he nor Mr. McConnell had any prior experience trying a capital murder case [Addendum No. 25 pp. 199-201], but he was the one who determined duress was a possible defense to the rape charge, and he determined they should request a psychologist or psychiatrist to explore, develop, and prove Petitioner was under the duress of his co-defendant, Martin.

Petitioner had been evaluated by Dr. Bursten to determine competency and sanity, but Dr. Bursten's evaluation was not for the purpose of mitigation or to determine whether Petitioner was under duress of the co-defendant during the time the crimes were

committed. According to Mr. McAlexander, Ms. Ford, a psychologist, examined Petitioner on motion of the State. The parties were not satisfied with her report so the defense hired Dr. Bursten. However, Petitioner's trial counsel decided not to have Dr. Bursten testify at trial. The State requested another examination at Middle Tennessee Mental Health Institution in Nashville, Tennessee, but the defense was successful in their objection to another state-requested evaluation. However, the defense then decided they needed a psychiatrist to assist in formulating the duress defense, but the trial court denied funding. Mr. McAlexander stated they talked about using psychiatric testimony during the sentencing phase but ultimately decided against using such testimony [Addendum No. 25, pp. 202-220].

Petitioner's lead retained trial counsel, Richard McConnell, also testified at Petitioner's state post-conviction hearing. When questioned about his representation of Petitioner and the fee he charged, Mr. McConnell testified he was paid a total of $10,000 by Petitioner's family to represent him. In addition, Petitioner's family paid the bills of a private investigator and Dr. Bursten. Although Mr. McConnell testified he did not think $10,000 was a reasonable fee for the case because of its magnitude, he agreed to that fee due to the financial situation of Petitioner and his family. Mr. McConnell denied complaining about his fee, but acknowledged he and co-counsel joked about the fact that co-counsel, who was court appointed, would make more money representing Petitioner than Mr. McConnell,

retained counsel. Mr. McAlexander testified that he and Mr. McConnell had some discussion about the fact that Mr. McAlexander would make more money on Petitioner's case than Mr. McConnell. Mr. McConnell testified he contacted the family requesting an additional $5,000 be paid in addition to the original fee, and he remembered contacting Petitioner in jail requesting an additional $500 in expense money so he could rent a motel room [Addendum. No. 26, pp. 233-252].

Mr. McConnell testified he conducted a complete investigation into Petitioner's life although he had no recollection of obtaining any of Petitioner's employment records, birth records, military records, or medical records.[10] When asked if he conducted any separate interviews of siblings to explore mitigating issues, such as physical or emotional abuse, Mr. McConnell responded:

> I certainly wouldn't have wasted time on that. Mr. West never raised those issues in my many, many discussions with him; many, many hours. I did discuss Steve's background with the family, with Wanda West, Vester West, although Mr. Vester West was not too communicative.
>
> Yes [Mr. Vester West is his father], and with some of his siblings. They were all — one sister particularly, your Honor,

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[10] The state post conviction record indicates the defense filed a subpoena requesting Petitioner's school records after the trial was in progress [Addendum No, 26, pp. 263-265].

> was very interested in this case and she was there. I don't remember her name. She came to the jail. We talked. She came to my office many, many times I don't remember her name at this point. Mr. West never raised any physical, I guess if that's what you're talking about, or sexual abuse or anything of this nature. I would have been chasing down blind alleys if I checked that out.

[Addendum No. 26, pp. 267-68].

When the court inquired whether any other person, including Petitioner's sister, raised the abuse issue with him, Mr. McConnell was adamant that no one had ever discussed any abuse claim with him. Mr. McConnell testified Dr. Bursten was to conduct a mental exam of Petitioner to determine his competency and whether there were any bases for an insanity-type defense. Dr. Bursten determined there was no basis to allege Petitioner was incompetent or insane at the time of the commission of the crime.

When discussing whether counsel questioned Petitioner about abuse, Mr. McConnell testified:

> No. What I said, sir, to refresh your recollection, is that Mr. West never raised any physical or sexual abuse. I spent hours and hours discussing his background with him, what possible defenses, that he was in serious difficulty here, serious trouble, that he faced the death penalty, two counts, and went over and over again anything that would be

> helpful to me in his defense and he never raised either of those issues. Whether I specifically asked him, "Steve, were you ever sexually abused by anyone? Were you ever physically abused," at this point after almost 10 years, Mr. Rogers, I don't recall.

[Addendum No. 26, p. 277].

Mr. McConnell testified that he did not find Petitioner to be entirely credible on a number of issues; thus, he did not rely totally on what Petitioner told him. Mr. McConnell also testified that once he got involved in the case, he was not able to persuade Agent Scott to stop interviewing Petitioner, so he sent a Western Union telegram to the District Attorney General demanding that the questioning stop, and Mr. McConnell immediately drove to the Union County Jail. According to Mr. McConnell, there was concern with Petitioner's credibility since he first denied any involvement with the murders, but eventually admitted being present when the murders occurred, but then denied any responsibility. When questioned about the defense's theory during the penalty phase, Mr. McConnell testified:

> Yes. We attempted to show that Mr. West was a veteran of military service in Germany, U.S. Military, that he had a wife and a new baby, that it would be an extreme hardship on Karen West to lose a husband since she had just had the new baby. As I recall, she was almost due

with child when this occurred. We had — again, I stuck with the theory of pinning this on Mr. Martin, who we had every reason to believe was involved with a satanic cult and had the motive to commit these murders that Mr. West didn't. Mr. West never even knew these people before is the indication and Mr. Martin had dated the Romines girl, Sheila Romines, and she had left him, "jilted him," and the theory was that Mr. Martin had gotten Mr. West over there and that although Mr. West had voluntary[11] sex with Sheila Romines, which he insisted upon, that he had nothing to do with the murders and that he was innocent of those heinous crimes.

And, of course, the Jury having found that he was guilty of those crimes, that wasn't particularly strong, but we really — sympathy basically. We had a young man, relatively young. I think he was 26 years old at the time, Mr. West. He had a wife and child. He had no prior convictions of any sort. And we tried to appeal to the common sense and to the decency and to the sympathy of the jury. That's basically it.

[Addendum No. 26, pp. 291-92].

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[11] Petitioner testified during trial that Martin forced Miss Romines to have sex with him and he did these things because he was afraid of Martin [Addendum No. 10, pp. 11-18].

When asked by the court whether he agreed that evidence of a long-term personality disorder, if one existed, would have been important evidence to present as mitigation during the sentencing phase, Mr. McConnell responded:

> Yes, but I'd like to qualify my response. Yes, I certainly would have; however, I had had Mr. West examined by a very competent psychiatrist, Dr. Bursten, who obviously did a thorough history, et cetera, and none of that ever came out. It would have been nice to have had the psychological that we asked for and maybe something would have been developed there, but the Court felt in its power that the psychological was not warranted and I think Judge Asbury's reasoning was that we had gone up to the Court of Criminal Appeals and objected to the Court's sua sponte ordering of a psychological to determine competency. And that I believe Judge Asbury told Mr. McAlexander this, that, you know, "You didn't want it then and I'm not going to give it to you now." Basically that's what it amounted to and that was basically it. We didn't have anything that would indicate that. It would have been nice, sure, but we didn't have it.
>
> ... There was absolutely no indication of that. I had met with the family members. They seemed like a very close group. They all stood behind Steve and I went

> into — I met with them many, many times to discuss any possible defenses and it was never raised either by Mr. West or any of his siblings or his mother or father.

[Addendum No. 26, pp. 292-95].

Mr. McConnell testified that Petitioner's military records indicated he had drug and alcohol problems in Germany. Therefore, Mr. McConnell decided not to introduce Petitioner's military records because he determined they would be prejudicial to Petitioner and his defense [Addendum No. 26, pp. 300, 308]. Mr. McConnell recalled interviewing the family and that Wanda West, Petitioner's mother, was the best source of information. Mr. McConnell met with family members on numerous occasions, and Petitioner's sister, Ms. West, was particularly interested in Petitioner and came to Mr. McConnell's office on numerous occasions and testified on Petitioner's behalf during the sentencing phase. When Mr. McConnell was asked if Ms. West made him aware that Petitioner suffered from extreme physical abuse and that he told her it was not relevant, Mr. McConnell testified:

> Absolutely not and if she said that she lied, because that never happened; absolutely never happened. If it had happened, sir, I would have done as Mr. Rogers suggested and I would have conducted a more in-depth investigation into those allegations. But I can assure

> you none of those charges or allegations or statements of fact never happened.
>
> No [no one ever alleged any abuse]. When I first interviewed them I asked them if he had a normal childhood and whatnot. I do recall that much. And they said yes. They seemed to be a happy family. They were certainly all backing Steve, and from my experience that's rather unusual when somebody gets involved in a heinous crime like this.

[Addendum No. 26, pp. 299-302].

According to Mr. McConnell, Mr. Holt, one of the private investigators, conducted an investigation to determine whether Petitioner's co-defendant had been involved in a satanic cult. There were several allegations that Martin was involved in a devil worship cult, and Mr. McConnell was trying to determine Martin's motive for committing these crimes since Petitioner had not previously known the victims and had no apparent motive for participating in these murders.

> He [West] had never even met either Sheila Romines or her mother Wanda prior to this night of the murders. And so when we got information to the effect that Martin was involved in this devil worship cult, that it's a far-out theory, but I felt it should be checked out that Sheila Romines had jilted him, had written him off as a boyfriend and that he in his own twisted mind, according to

> the rules of the cult, apparently was that if a virgin, which apparently Ms. Romines was, were to be violated, raped, then the person that did that would be with her in hell forever. And when I heard this type of stuff I asked Mr. Holt to check this out.

[Addendum No. 26, pp. 304-05].

Mr. McConnell testified Mr. Holt led him to believe there were certain witnesses that would corroborate the alleged cult, and Mr. Holt provided affidavits from those witnesses. However, when Mr. McConnell personally interviewed the witnesses, they did not corroborate the cult allegations [Addendum No. 26, pp. 309].

Attorney Jerry Summers testified during the state post-conviction hearing as an expert on Petitioner's behalf. He testified that trial counsel should have obtained a psychological evaluation of Petitioner for use at the sentencing phase. In addition, Mr. Summers testified that trial counsel should not have waived the second degree murder jury instruction. Trial counsel should have requested a second degree murder instruction and argued if Petitioner was guilty, it was second degree murder. In Mr. Simmer's opinion, in light of the totality of the circumstances, trial counsel performed below the standard which is required for effective assistance of counsel under the Sixth Amendment of the United States Constitution [Addendum No. 26, pp. 312-347].

Petitioner's older sister, Patricia Depew, testified that although she could not recall much about her

life prior to age nine, she and Petitioner endured a substantial amount of physical and verbal abuse. Ms. Depew testified her oldest sister, Debra West, lived with their grandmother and that Petitioner's older brother was their mother's favorite child. Ms. Depew testified her mother would beat her and Petitioner often by "[s]winging a belt so long and so hard that it would wear her out[,]" resulting in "[b]ruises, black eyes, busted lips, pulled hair, pinch marks, [and] bruises" [Addendum No. 26, pp. 369-371]. Ms. Depew described Petitioner as a small, quiet, passive, child who cringed around his parents and cried often. Ms. Depew attended some of the meetings with Petitioner's trial attorneys, but she was never asked about the abuse, and she never offered any information about the abuse. Additionally, according to Ms. Depew, Vester West, Petitioner's father, was an alcoholic with a bad temper who physically abused all of the children [Addendum No. 26, pp. 372-378].

Ruby West, Petitioner's aunt, testified that she lived upstairs from Petitioner when he lived in Ohio. She testified that Petitioner's father abused alcohol, his mother abused prescription drugs, and that she observed Petitioner being beat by his mother. Ms. West described the abuse:

> I'd go down there and I'd look after the children. And if Steve came out of the room or Patty she was swearing at them. She'd take her fists and just beat them and put them in this cold, cold room with a mattress very wet from urine and that's where they stayed. Occasionally I would

make bottles and there would be green in these bottles and I would sneak the bottles into them.

Steve was about three. Patty might have been four. I'm not sure.

I came down. Patty came out to get some food for Steve and she started swearing at them and she ran in there and just slung Steve up against the wall; grabbed him by his feet. There was blood and he started throwing up. And she said "I feel like killing the little bastard." She walked out. I cleaned them up and took them to the hospital. His nose was bleeding and his mouth was bleeding.

She was constantly hitting him. He had bruises on him; pinching him, slinging him back in that room if he came out.

He was very timid. He never said anything. He would just cry. If he saw her coming towards him he'd scream out and start crying and just stand there and let her beat him. A few occasions I asked her, "Please, why are you doing this?" She said "If could kill him and get away with it I would."

I seen him [Mr. Vester West] beat occasionally, but she would always go tell him the kids had done something and he needed to whip them.

[Addendum No. 26, pp. 380-84].

Ms. Ruby West testified that she was never contacted for the jury trial and that she had not seen Petitioner since his mother's death. Ms. West stated she was asked to testify at the post-conviction hearing after her husband was contacted and informed that someone needed to testify about the abuse of Petitioner. Ms. West testified that Petitioner did not have a close loving relationship with his parents. She stated that he "shiver[ed] up" when he saw his parents coming [Addendum No. 26, pp. 384-89].

Attorney Paul Morrow also testified at the state post-conviction hearing as an expert. In Mr. Morrow's opinion, trial counsel was deficient during the sentencing hearing because they failed to adequately investigate Petitioner's background. Mr. Morrow agreed with attorney Summers that the alcohol abuse documented in Petitioner's military records was "a red flag or I would say a rocket going off saying that you better look back into that person's history" [Addendum No. 26, pp. 394-408]. In addition, it was Mr. Morrow's opinion that Petitioner's inability to remember his first ten years of life was a red flag that should have been investigated further [Addendum No. 26, pp. 409-420].

The State called Dr. Ben Bursten, an Oak Ridge, Tennessee psychiatrist who examined Petitioner prior to his state trial. Petitioner's trial counsel, Mr. McConnell, had Dr. Bursten evaluate Petitioner on July 26, 1986. Dr. Bursten met with Petitioner for a couple of hours and performed a psychiatric evaluation which included a brief test of intelligence,

the Shipley Scale. Later that day, Dr. Bursten also met with Petitioner's parents. Dr. Bursten determined Petitioner was competent at the time of the offense and competent to stand trial. Dr. Bursten told Mr. McConnell that he was sorry, but he could not support a conclusion that Petitioner had "any untoward mental reactions at the time of the offense" [Addendum No. 26, pp. 421-27].

Dr. Bursten asked Petitioner about abuse because Petitioner had claimed his father was an alcoholic. Petitioner did not tell Dr. Bursten that he did not remember whether there was any abuse, but rather, Petitioner told him there was no abuse. When asked if he confirmed that there was no abuse with family members, specifically his mother and father, Dr. Bursten testified:

> I didn't confirm that directly. I did not ask them if there was abuse, and the reason for that was that I had a nice discussion with them and they told me that he was the most lovable of all their children, that he got along very well, that he always wanted to emulate his father, they are very close, he got into no trouble, it was another child, Teddy -- they compared him to Teddy and he said not like Teddy who got into kind of trouble. He had never been suspended, et cetera. They created such a picture of a close family. You have to be a little sensitive about the people you are talking to. I thought it would just be outrageous

> to say, "Well, tell me the truth. Did you abuse him?" So I did not do that.

[Addendum No. 26, pp. 427-29].

Dr. Bursten agreed with Dr. Engum's report that Petitioner had an adequate IQ, if not above average. However, he disagreed, based on the records, including Dr. Engum's report, with the conclusion that Petitioner was abused as a child. Dr. Bursten disagreed with Dr. Engum's statement that people who cannot remember their childhood are often victims of child abuse, but agreed with Dr. Engum's statement that this is a controversial area. Dr. Bursten testified:

> ... it's so controversial that the American Psychiatric Association has put out a track warning people, warning practitioners, not to make this kind of conclusion, this kind of backward conclusion; that the fact that a person can't remember, has repressed memories or whatever, does not mean anything one way or the another. You cannot - - there is no data. And it seemed to me that Dr. Engum despite his disclaimer was bringing this up as - - you know, if you can't use it why put it in your report. Just leave it at that.
>
> [There was one other thing that concerned me now that you've asked me that. To support the fact of what he called potential abuse, although I don't know what that term means, but to

support that effect he looked at two scales of the MMPI, the Minnesota personality test. He looked at the Hysteria Test and he looked at the Hypochondriasis Test and he said when these two scales are elevated it often, again the word often, it often is an indication that this person fears bodily harm and is very protective of his body, his or her body, because that person is afraid of being injured in some way. And then he ruled out that this was because of physical - - of illnesses and things like that, leaving at least the strong implication, which he then uses in his conclusion, that this then is another indication of possible abuse.

That is incorrect and the reason it is incorrect is severalfold. If you look at Dr. Engum's report you will find not only those two but, I forget, maybe three, four, maybe five of the scales, many scales, are elevated; not just those two scales. And the F Scale is elevated. The F Scale shows is a tendency to elevate your responses in the direction of illness. And you can see that in the report because so many scales were elevated.

I want to make something clear. This sometimes is found, the F Scale, in malingerers. I am not saying - - sometimes. I am not saying Mr. West was malingering. I have no indication other

than the typical self-defensiveness that people use in these kinds of situations that he was malingering. But, there are many other things that can cause elevation of the F Scale. Confusion can cause it. Distress can cause it. Particularly if you are feeling pressured -- sometimes they have what you call the cry for help and that means that you will tend to elevate your other scales, all your scales, and your F Scale as an unconscious exaggeration. You don't mean to fool anybody but you tend to magnify the things that you feel.

So that just on the basis of the F Scale and the other elevations I don't see how he could conclude that those two scales had any relevance at all as far as wanting to protect his body. He had no direct evidence. I heard nothing that the patient - - that the, I'm sorry, defendant said: oh, he's afraid that somebody is going to attack me. So there's no direct evidence. I think this indirect evidence is a leap that's unwarranted.

Also if we went by what he said we would have to wonder then, you mean everybody who is a hypochondriac has been abused because they all get high scales. You know, on the face of it it doesn't make sense.

[Addendum No. 26, pp. 431-351].

When asked if there was enough objective criteria given the results to make a call one way or the other regarding the abuse, Dr. Bursten testified the only hard data that he could find was his data that there was no abuse. Dr. Bursten was asked to assume for the sake of argument that there was abuse and asked if he would agree with Dr. Engum's conclusions about the effect of the abuse, *i.e.*, that it caused extreme emotional disturbance. Dr. Bursten testified:

> No, I would not. In other words, the subsequent conclusions drawn from that I can't support either.
>
> There's a whole series of leaps. I think I mentioned the first one, which is the leap to what's called potential abuse. And starting from this so-called potential abuse we begin to build a house; Dr. Engum begins to build a house. He says people like this who have undergone this thing tend to be very compliant and the reason for that is they are dependent, they are afraid, they almost live in fear of being abandoned by friends, so they tend to be very dependent and this causes compliance.
>
> And then from there he makes another leap, which I don't have any information about. He says this man was not the active participant and this goes along with the compliance. I have no data as to whether he was or was not the active

participant, but at least I don't recall Dr. Engum presenting any data in that way either.

Going on from that he then reaches the conclusion, another leap, that people like this often feel - - because they have to comply with people they come under the domination of other people. Not always. Not always even granted the child abuse. Some of these people do become submissive and compliant and fearful. Some of these people become abusers. It's well-known that some people who have been abused as a child are anything but submissive and compliant. They beat up on their wives. They beat up on their children and so on. They dominate their wives. Assuming the abuse, you can't come to one conclusion or another without any data as to which category this person was.

Then he goes on to the question of extreme emotional distress, disturbance I guess is the term, and again I don't see the data. He says because - - in essence, as I understand it, he says and the test results support this, because he's under the domination of Mr. Martin he was - - and he also brings in the fact that he has had a long-standing personality disorder and he's emotionally unstable, therefore, in this instance - - because, that's what we are talking about, we are talking

> about the time of the offense - - therefore, in this instance he was under emotional distress.

[Addendum No. 26, pp. 431-38].

> With regard to the business of unstable personality and all the personality problems, that in itself doesn't mean that at this particular junction he was under extreme duress. For two or over two years I was a psychiatrist at Brushy Mountain and I was a psychiatrist at Morgan County and I never found anyone with what I would call a wonderful, stable personality, but that doesn't mean that they were all under distress at the time of the occurrence. So I think that's another leap.
>
> So what we have here as far as I can see, my conclusion, even if one is going to grant the abuse is that what we have here is a house built with very flimsy board and is resting on a foundation of sand.

[Addendum No. 26, pp. 438-39].

On cross examination of Dr. Bursten, defense counsel questioned the meaning of the following information in his report which apparently was reported to him by West:

> When he went to Myrtle Beach he went downhill from there, spent a lot of money, he was drinking, having a good time....

> Steve drank a lot. He always had his beer . . . he told me he had abused drugs. ...Ronnie comes back 'come on' Ronnie: Kill them both. Don't go over where blood on where belly on bed. Cries on pants - - I feel sick.... Dazed. Sick. He stabs her.... I start crying ... I feel like throwing up . . . She falls back. I feel like throwing up. I'm confused. I hear squishing noise. Gun in my back again. It's crazy. No reason. Why. He stabbed her. I was there but like I can't do a thing. I had tears in eyes. Shaking. Like nothing I could do. He said he and John Allen had killed Allen's wife or mother and if I turned him in Allen would get Karen.

[Addendum No. 26, pp. 475-82].

When asked if that information "could help support a leap to the conclusion that he was compliant and susceptible to domination and control of a much younger and less physically imposing person than himself," Dr. Bursten replied , "[t] aken alone as it is out of context, yes, but taken in the context of everything that he told me, there are counterbalancing things which far outweigh that" [Addendum No. 26, p. 478]. When asked if somebody reading his notes could reach a different conclusion than he did, Dr. Bursten responded, "[c]ertainly experts disagree all the time, or some of the time let's say. But, I would hope that the expert at least would read the whole thing and consider it in context and balance rather than just selecting here, there

and other places to support one side of the issue." [Addendum No. 26, pp. 482-83].

II. PROCEDURAL BACKGROUND

The State of Tennessee has provided the Court with copies of Petitioner's state court proceedings [Doc. 67, Addenda 1- 44]. Petitioner's conviction and sentence were affirmed on direct appeal. *State v. West*, 767 S.W.2d 387 (Term. 1989).

Petitioner filed his original petition for post-conviction relief on October 23, 1990, in the Criminal Court of Union County, Tennessee. Petitioner alleged twenty-three instances of ineffective assistance of counsel [Addendum No. 22]. Petitioner, through his attorneys, filed an amended petition on September 24, 1996 [Addendum No. 25]. At the conclusion of an evidentiary hearing and after considering post-hearing briefs, the trial court denied the petition on April 14, 1997.

On May 2, 1997, Petitioner, through counsel, filed a notice of appeal. Petitioner appealed to the Tennessee Court of Criminal Appeals on the following issues:

(I) Petitioner Stephen Michael West's Death Sentence Should be Vacated Because he was Ineffectively Assisted by Counsel at his Sentencing Hearing

B. Defense Counsel's Failure to Investigate Petitioner's Background Falls Well Outside the Wide Range of Professionally Competent Assistance.

1. Attorneys Mr. McConnell and Mr. McAlexander Failed to Investigate and Present the Ample Mitigation Evidence Available from Petitioner's Family Members.

2. Attorneys Mr. McConnell and Mr. McAlexander Failed to Investigate And Present the Ample Mitigation Evidence Available from Psychological Evaluation of Petitioner.

C. Defense Counsels' Deficiency Was Clearly Prejudicial Because the Jury Was Unable to Consider and Give Effect to All Mitigating Evidence.

D. The Trial Court Erred in Denying Petitioner's Post-Conviction Relief Based Upon Ineffective Assistance of Counsel During the Sentencing Phase of Trial Because Petitioner Presented Sufficient Proof to Show Ineffective Assistance of Counsel and Prejudice to the Petitioner.

(II) Petitioner's Case Must be Remanded for a New Sentencing Hearing because the Evidence Insufficiently Supports the Aggravating Circumstance that Petitioner's Actions Were Committed to Avoid Arrest or Prosecution.

(III) Petitioner Stephen Michael West's Conviction Must be Set Aside Because the Trial Judge Did Not Charge the Jury on Applicable Lesser Offenses.

A. The Evidence Clearly Supported a Charge of Second Degree Murder.

B. Trial Counsels' Waiver of a Lesser Included Offense Charge to First Degree Murder Constituted Ineffective Assistance of Counsel.

C. The Post-Conviction Court's Determination of Waiver by the Petitioner in [sic] Incorrect.

(IV) The Post-Conviction Relief Trial Court Erred in Conducting and Denying Petitioner's Ex-Parte, Motion For Defense Services.

A. The Trial Court Violated Petitioner's Constitutional Right to Support Services By Denying the Properly Requested Defense Services.

B. Trial Court Erred in Making Available Petitioner's Ex-Parte Motion to the State of Tennessee and in Allowing the State of Tennessee to Participate in the Ex-Parte Hearing for Support Services.

[Addendum No. 28, pp. i-ii].

The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court which denied relief. The appellate court concluded (1) Petitioner did not meet his burden with respect to the allegation of ineffective counsel at the sentencing phase, he failed to meet his burden of proof as to the sub-issues, and Petitioner failed to show how he was prejudiced by any acts or omissions of counsel; (2) Petitioner failed to raise the claim that there was no

evidence to support the aggravating factor to infer he acted in order to avoid prosecution during his direct appeal and therefore, failed to overcome the waiver provision; (3) the lesser included offense claim was waived and the claim was without merit; and (4) Petitioner failed to demonstrate professional investigative services were required, thus this claim was without merit [Addendum No. 31, pp. 16-23].

Petitioner filed a petition for rehearing which was denied [Addendum Nos. 32-33]. Petitioner then appealed the judgment of the Tennessee Court of Criminal Appeals to the Tennessee Supreme Court. In his application for permission to appeal, Petitioner raised the following issues:

I. Whether Petitioner was Ineffectively Assisted at Trial and on Direct Appeal Due to Defense Counsels' Failure to Adequately Investigate.

II. Whether Petitioner's Death Sentence is Invalid and Must be Remanded For Resentencing Because the Lower Courts Have Prevented a Sentencing Jury From Considering and Giving Effect to a Substantial Amount of Mitigating Evidence in Violation of Both Tennessee Law and the United States Constitution.

III. Whether Petitioner's Death Sentence is Invalid and Must be Remanded for Resentencing Because the Sentencing Jury Impermissibly Considered an Invalid Aggravating Factor.

IV. Whether Petitioner Stephen West's Conviction Must be Set Aside Because The Trial Judge Did Not Charge the Jury on Applicable Lesser Offenses.

V. Whether the Trial Court Impermissibly Denied Petitioner His Statutory and Constitutional Right to a Full and Fair Hearing When it Improperly Denied Petitioner Funds for Expert Services.

[Addendum No. 34, p. xix].

The Tennessee Supreme Court granted the application for permission to appeal only on the issue of whether the evidence at trial was sufficient to establish the aggravating circumstance that the murders were committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. The Tennessee Supreme Court concluded the claim, which was raised for the first time on post-conviction appeal, had been previously determined pursuant to that court's statutorily-required review of Petitioner's death sentence and waived because Petitioner failed to raise the claim on direct appeal [Addendum No. 43, pp. 24-27]. Therefore, the Tennessee Supreme Court affirmed the judgment of the Court of Criminal Appeals denying post-conviction relief on this claim. Petitioner's petition for rehearing was denied by the Tennessee Supreme Court on June 7, 2000.

On February 20, 2001, in the United States District Court for the Middle District of Tennessee, Nashville Division, Petitioner's counsel filed a motion for appointment and for a stay of execution, despite the fact that Petitioner had refused to allow counsel to file a habeas petition on his behalf. Respondent filed a motion to dismiss, and, after a hearing, the United States District Court for the

Middle District granted the motion for appointment of counsel and transferred the case to the Eastern District for further proceedings. The case, assigned to Judge Curtis L. Collier upon transfer to the Eastern District, was subsequently reassigned to the undersigned.

On February 22, 2001, Judge Collier verbally ordered a stay of Petitioner's execution until the United States Magistrate Judge could conduct a hearing on Petitioner's competency. The stay order was entered on February 23, 2001 [Doc. 7]. Respondent filed a notice of appeal on February 26, 2001 [Doc. 8]. On February 27, 2001, the United States Court of Appeals for the Sixth Circuit determined the stay of execution had to be vacated because there was not a proceeding before the district court since Petitioner, nor anyone qualified to move on his behalf, had filed the requisite documents necessary to begin a proceeding in the district court [Doc. 10].

On February 28, 2001, Petitioner filed a motion to proceed *in forma pauperis* and requested appointment of counsel under 21 U.S.C. § 848 to prepare and file a petition for *habeas corpus* under 28 U.S.C. § 2254 [Doc. 13]. Also filed on February 28, 2001, was a motion for stay of execution to investigate and prepare petition for writ of *habeas corpus* [Doc. 16]. Petitioner's motions were granted [Doc. 17 & 18]; counsel was appointed; and his execution is presently stayed pending resolution of his petition.

During the course of this proceeding, Petitioner has filed numerous motions. A motion for leave of court to have an *ex parte* hearing and to file a budget under seal [Doc. 33] was filed on Petitioner's behalf and granted [Doc. 45]. Petitioner filed a motion for production of the TBI records related to his case [Doc. 61]. Petitioner was granted the discovery to the extent he was authorized to obtain records related to co-defendant Martin's overriding culpability, Petitioner's claims of acting under duress, co-defendant Martin's prior relationship with the victim, co-defendant Martin's prior violent acts, Petitioner's innocence, and whether co-defendant Martin raped the victim [Doc. 80]. Petitioner also filed a motion for discovery requesting an order authorizing a subpoena *duces tecum* for Paul Bigbee and Cleland Blake for production of all records in their possession relating to Petitioner's Union County Criminal Court case No. 415A [Doc. 63], which was denied [Doc. 81]. Petitioner's motion to hold proceedings in abeyance [Doc. 64] was also denied [Doc 112]. Petitioner filed four motions for leave to expand the record [Doc. 115, 129, 160, 166], which have been granted [Doc. 145, 168, 181]. Petitioner's second motion for discovery [Doc. 101] was denied [Doc. 147]. Petitioner filed a motion to amend his petition [Doc. 151], which was denied [Doc. 168]. Petitioner's motion to hold in abeyance pending the exhaustion of his *Apprendi* claim in state court [Doc. 155] was also denied [Doc. 168].

On June 7, 2001, Petitioner filed his petition for writ of *habeas corpus* [Doc. 40]. On February 25, 2002, he filed an amendment to his petition [Doc.

111]. Respondent has filed two motions for summary judgment [Doc. 65, 124], to which Petitioner has objected [Doc. 74, 79, 144].

III. STANDARDS OF REVIEW

A. Habeas Claims Cognizable Under 28 U.S.C. § 2254

A federal district court has jurisdiction to grant a writ of *habeas corpus* under § 2254 of Title 28 to the *United States Code*. 28 U.S.C. § 2254. Section 2254(a) limits the court's jurisdiction to those cases in which a petitioner "in custody pursuant to the judgment of a State court" alleges "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The initial question in a habeas petition is, therefore, whether the petitioner raises claims cognizable under § 2254(a).

B. Review of Habeas Claims on the Merits

Section 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[12] limits a federal district court's jurisdiction to review habeas claims on the merits. In particular, a court considering a habeas claim must defer to any decision by a state court concerning that claim unless the state court's judgment (1) "resulted in a decision that was contrary to, or involved an

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[12] President Clinton signed the AEDPA into law on April 24, 1996. Pub. L. No. 104-132, 110 Stat. 2414 (1996). The AEDPA generally applies to cases filed after the Act became effective. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999), *cert denied*, 120 S. Ct. 2658 (2000).

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).[13] The United States Supreme Court has interpreted the language of Section 2254. *See Williams v. Taylor*, 529 U.S. 362, 402 (2000) (O'Connor, J., delivering the opinion of the Court as to Part II and concurring as to Parts I and III-V); *see also Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000), *cert denied*, 532 U.S. 947 (2001) (construing *Williams*).

According to the *Williams* Court, the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" refers to "holdings, as opposed to dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. Hence, a

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[13] As amended, § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

federal district court hearing a habeas corpus petition may not look to lower federal court decisions to determine whether the state court's decision "was contrary to, or involved an unreasonable application of, clearly established law." *See id.; Harris*, 212 F.3d at 943-44.

The phrase "contrary to . . . clearly established precedent" means "substantially different from the relevant precedent of [the Supreme Court]." *Williams*, 529 U.S. at 405. A state court decision is "contrary to . . . clearly established precedent" if the state court applied a rule contradicting the governing law set forth in Supreme Court cases. *Id.* Similarly, a state court decision is "contrary to . . . clearly established precedent" if the state court confronted a set of facts materially indistinguishable from a Supreme Court decision and arrived at a different result. *Id.* at 405-08. However, a state court decision applying valid Supreme Court precedent does not fall within the "contrary to" language and cannot be reviewed by a federal court under § 2254(d)(1), even if the federal court would have reached a different result in applying the rule.

The phrase "an unreasonable application of . . . clearly established precedent" means an "application of clearly established law [that] was objectively unreasonable." *Id.* at 409. It does not mean "an *incorrect* application of federal law." *Id.* at 410 (emphasis original). Hence, if a federal court concludes in its independent judgment that the state-court decision applied clearly established federal law erroneously or incorrectly, it could grant

habeas relief under § 2254(d)(1) *only if* the application was also unreasonable. *Id.* at 410-13.

In sum, the changes made to § 2254(d) by the AEDPA require federal courts to pay greater deference to the determinations made by state courts than they were required to under the previous statutory language. *Tinsley v. O'Dea*, 142 F.3d 436 (6th Cir.) (unpublished table decision), *available in* 1998 WL 124045, at *2, *cert. denied*, 525 U.S. 937 (1998); *Harpster v. Ohio*, 128 F.3d 322 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998); *Spreitzer v. Peters*, 114 F.3d 1435, 1441 (7th Cir.), *modified on other grounds*, 127 F.3d 551 (1997), *cert. denied*, 522 U.S. 1120 (1998).

C. Factual Bases for Habeas Claims

In reviewing a state court's adjudication of a habeas claim, the federal district court must presume the state court's factual determinations were correct. 28 U.S.C. 2254(e)(l).[14] The petitioner

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[14] As amended, § 2254(e) provides:

(1) In a proceeding instituted by an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —

(A) the claim relies on-

may rebut this presumption of correctness by clear and convincing evidence. *Id.* If the petitioner has failed to develop the factual basis for his habeas claim in the state-court proceedings, however, he generally is not entitled to an evidentiary hearing unless (1) the legal or factual basis of the habeas claim did not exist at the time of the state-court proceedings, and (2) "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." *Id.* § 2254(e)(2).[15]

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

Id. § 2254(e).

[15] The court determines whether an evidentiary hearing is required based on its review of the answer, transcript, record of state court proceedings, and expanded record. RULES GOVERNING § 2254 CASES IN THE U.S. DISTRICT COURTS R. 8. If a hearing is not required, the court shall dispose of the petition as justice dictates. *Id.*

A petitioner "fail[s] to develop the factual basis" for his habeas claim in the state-court proceedings through a lack of diligence or some greater fault attributable to him or his counsel. *Williams v. Taylor*, 529 U.S. 420, 431-35 (2000).[16] Congress intended that "prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Id.* Hence, whether a petitioner must satisfy the heightened standard imposed by § 2254(e)(2) depends on whether the petitioner was diligent in his efforts to develop a factual basis for his claim, not on whether the facts could have been discovered or whether those efforts would have been successful. *Id.* at 433-37.

Lack of diligence will not bar an evidentiary hearing if efforts to discover the facts would have been in vain because there is no relationship between the petitioner's fault and the impossibility of discovery. 28 U.S.C. § 2254(e)(2)(A)(i). Similarly, a petitioner's lack of diligence or fault will not bar a hearing if there is clear and convincing evidence a reasonable trier of fact would not have found the petitioner guilty of the underlying offense but for constitutional error, *id.* § 2254 (e)(2)(B), or if a new rule of constitutional law not available at the time of the earlier proceedings is made retroactive to cases on collateral review by the Supreme Court, *id.* §

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[16] This case is different from the previously cited case of *Williams v. Taylor*, 529 U.S. 362 (2000). This case was decided on the same day as the previously cited case but involves a different petitioner.

2254(e)(2)(A)(i). Thus, a petitioner who failed to develop the factual basis of a claim in state court proceedings through lack of diligence or fault has an opportunity to obtain an evidentiary hearing if the legal or factual basis of the claim did not exist at the time of state court proceedings. *Williams*, 529 U.S. at 435-37.

In summary, a prisoner must be diligent in developing the record and, if possible, in presenting all claims of constitutional error so the state court will have its rightful opportunity to adjudicate federal rights. If the prisoner contributes to the absence of a full and fair adjudication in state court and fails to diligently develop the record, then an evidentiary hearing is prohibited in federal court pursuant to § 2254(e)(2) unless the statute's other stringent requirements are met. If a prisoner made insufficient effort to pursue a claim in state court, then he will be prohibited from pursuing the claim in federal court. However, if a prisoner failed to develop the factual basis of a claim because he was unable to develop his claim in state court despite diligent effort, then an evidentiary hearing will not be barred by § 2254(e)(2). *See id.* at 437.

D. Procedural Default

Section 2254(b) limits a federal court's jurisdiction to hear a habeas claim to those cases in which a petitioner has exhausted all available state court remedies:

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

judgment of a State court shall not be granted unless it appears that-

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective processes; or circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(b); *see also Granberry v. Greer*, 481 U.S. 129, 133-34 (1987); *Rose v. Lundy*, 455 U.S. 509, 519 (1982); RULES GOVERNING § 2254 CASES IN THE U.S. DISTRICT COURTS R. 4.

A petitioner has failed to exhaust his available state court remedies if he still has the opportunity to raise his claim by any available state court procedure. *Gray v. Netherland*, 518 U.S. 152, 161 (1996), *Preiser v. Rodriguez*, 411 U.S. 475, 477, 489-90 (1973); *Gall v. Parker*, 231 F.3d 265, 283-84 (6th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001). To exhaust these state remedies, the petitioner must have presented to the state courts both the legal basis of the claim for which he seeks habeas relief and the factual basis of the claim. *Gray*, 518 U.S. at 162-63 (stating that the exhaustion requirement is

not satisfied "by presenting the state courts only with the facts necessary to state a claim for relief"); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). The factual allegations made in federal court must be the same factual allegations made in state court, and the substance of a federal habeas claim presented to the federal court must first be presented to the state court. *Picard*, 404 U.S. at 276.

When a petitioner raises different factual issues under the same legal theory, he is required to present each factual claim to the highest state court in order to exhaust his state remedies. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). A petitioner has not exhausted his state remedies if he has merely presented a particular legal theory to the courts without presenting each factual claim. *Pillette v. Foltz*, 824 F.2d 494, 497-98 (6th Cir. 1987). Moreover, each factual claim must be presented to the state courts as a matter of specific federal law. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made"); *Gray*, 518 U.S. at 163 ("It is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court"); *Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court").

Conversely, if a petitioner presented the substance of his habeas claim to the state courts, an elaboration of the facts or legal theories will not result in a new claim. *Jones v. Washington*, 15 F.3d 671, 674-75 (7th Cir.), *cert. denied*, 512 U.S. 1241 (1994). The standard for determining whether the petitioner has exhausted the factual basis of his claim is whether the additional facts "fundamentally alter the legal claim already considered by the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). The supplementation and clarification of the state-court factual record does not necessarily change a claim so dramatically as to require that the state courts be given a new opportunity to hear the issues. *Id.* at 258-60. The "failure to make every factual argument to support [a] claim does not constitute a failure to exhaust." *Patterson v. Cuyler*, 729 F.2d 925, 929 (3rd Cir. 1984); *see also Picard*, 404 U.S. 270 (1971) (A claim may be fairly presented to the state court without citing chapter and verse of the Constitution).

At bottom, a claim sought to be vindicated in a federal habeas proceeding must have first been raised in the state courts so the state courts have the first opportunity to hear the claim. The state court to which the petitioner presented the issue of federal law must address the merits of those claims. *Coleman v. Thompson*, 501 U.S. 722, 734-35 (1991). If the state court decides those claims on an adequate and independent state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner is barred by this procedural default from

seeking federal habeas review, unless he can show cause and prejudice for that default. *Edwards v. Carpenter*, 529 U.S. 446 (2000); *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977). Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman*, 501 U.S. at 752-53; *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

E. Miscarriage of Justice: Actual Innocence

A petitioner may avoid the procedural bar and the necessity of showing cause and prejudice by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (quoting *Carrier*, 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.; see also Sawyer v. Whitley*, 505 U.S. 333, 339 n.5 (1992) (holding that a petitioner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts

would have entertained a reasonable doubt" (citations omitted)).

In addition to a claim of actual innocence, a habeas petitioner must demonstrate "an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Thus, "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404. The Supreme Court of the United States has explicitly tied the fundamental miscarriage of justice exception to the petitioner's innocence to ensure the exception would remain rare and only be applied in the extraordinary case, while also ensuring relief would be extended to those who are truly deserving. *See Schlup*, 513 U.S. at 299.

The miscarriage of justice exception is concerned with *actual*—not *legal*—innocence. *See Smith v. Murray*, 477 U.S. 527, 537 (1986). Hence, to show "actual innocence" of the death penalty imposed, a petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found petitioner eligible for the death penalty. *See Sawyer*, 505 U.S. at 336. Actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Smith*, 477 U.S. at 537, *quoted in Sawyer*, 505 U.S. at 339-40. "Actual innocence" of the death penalty is a very narrow exception and must be determined by relatively objective standards. The "actual innocence"

requirement must focus on those elements that render a defendant eligible for the death penalty and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error. *Sawyer*, 505 U.S. at 347. Finally, "if a prisoner purposefully or by inadvertence lets the time run under which he could have filed his [habeas] petition, he cannot file a petition beyond the statutory time, even if he claims 'actual innocence.'" *Workman v. Bell*, 227 F.3d 331, 342 (6th Cir. 2000), *cert. denied*, 531 U.S. 1193 (2001).

F. Summary Judgment

Under Rule 56(c) of the *Federal Rules of Civil Procedure*, the Court will render summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to conclusively show no genuine issue of material fact exists. *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994), *cert. denied*, 516 U.S. 806 (1995); *Kentucky Div., Horsemen 's Benevolent Protective Assoc., Inc. v. Turfway Park Racing Assoc., Inc.*, 20 F.3d 1406, 1411 (6th Cir. 1994). The Court must view the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Oakland Gin Co., Inc. v. Marlow*, 44 F.3d 426, 429 (6th Cir. 1995); *City Management Corp. v. U.S Chemical Co., Inc.*, 43 F.3d 244, 250 (6th Cir. 1994).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party may not rest on its pleadings, but must come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benevolent*, 20 F.3d at 1411; *see also Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404-06 (6th Cir. 1992) (holding courts do not have the responsibility to search *sua sponte* the record for genuine issues of material fact). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper question for the trier of fact, but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435-36 (6th Cir. 1987). The standard for summary judgment mirrors the standard for directed verdict. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a [fact finder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. There must be some probative evidence from which the fact finder could reasonably find for the nonmoving party. If the

Court concludes a fair-minded fact finder could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Id.*; *Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benevolent*, 20 F.3d at 1411.

IV. ANALYSIS

The Court will address Petitioner's numerous claims in his amended petition for writ of *habeas corpus* and identify them as they are identified in his amended petition [Doc. 111].

A. Claims Adjudicated in State Court

1. Trial Court Excluded Evidence (Amended Petition ("Amd. Pet.") ¶ I.B)

Petitioner's first claim avers the trial court excluded certain relevant and probative evidence in violation of *Chambers v. Mississippi*, 410 U.S. 284 (1973). As a result, Petitioner contends he has been denied due process, compulsory process, and a fair trial. Petitioner claims the trial court excluded evidence that would have supported the defense theory that co-defendant Ronnie Martin was the mastermind of the offense, was the actual killer, and was more culpable than Petitioner. The Petitioner has raised several sub-issues in support of this general claim. Claim one (I) includes sections A through F. The Court will address claims B and E, which are the portions of this claim that were properly raised and addressed in the state courts, *i.e.*, Ms. Woods's statement, the Hunley tape, and failure to allow the jury to view Martin. Sections A,

C, D, and F will be analyzed elsewhere in this memorandum.

There are certain minimum essential rights afforded a defendant for a fair trial. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. at 294. However, "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* at 296.

a. Libby Woods Testimony (Amd. Pet. ¶ I.B.1)

Petitioner contends that the trial judge erroneously ruled that the proffered testimony of Libby Woods that Martin had made threats against Ms. Romines and that Martin's sexual advances had been rejected by Ms. Romines was hearsay and inadmissible because such statements were not subject to any hearsay exception. The Respondent argues that Petitioner presented this claim strictly as a state law violation on direct appeal.

Petitioner's claim on direct appeal combined the claim addressing the exclusion of Woods's testimony with the claim addressing the exclusion of the Hunley tape. In this habeas petition, the claims are raised as two separate sub-claims. On direct appeal Petitioner raised this claim by arguing that the trial

judge erred when he excluded testimony from Ms. Woods which demonstrated his co-defendant had hostile feelings against the teenage victim and that his co-defendant had previously made threats against the teenage victim. In state court Petitioner attacked the exclusion of Ms. Woods's testimony based on a claim that the trial judge erred when he excluded evidence to support Petitioner's defense that his co-defendant committed the murders. Petitioner supported his argument with the state law cases of *Green v. State*, 285 S. W. 554 (1926), and *Hensley v. State*, 28 Tenn. 243 (1848).

Petitioner did not mention the United States Constitution or cite to any federal cases in his argument regarding the proffered testimony of Ms. Woods. Although Petitioner did cite to the United States Constitution and federal cases under the claim that the trial court erred in excluding evidence to support his defense, he did so only in his argument that the court erred in excluding a tape recording of the co-defendant stating that he, the co-defendant, committed both murders. However, in conclusion of the claim, Petitioner did aver the following:

> The defendant attempted to introduce several pieces of evidence in his behalf which dealt with the motives of the co-defendant, his threats against the victims and his statement that he, the co-defendant, had committed the murders. At the very least, this evidence should have been presented to the jury for it to weight [sic] and consider. The failure of

> the trial judge to permit this resulted in a denial of the defendant's Due Process rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 7, 8 and 9 of the Tennessee State Constitution.

Although it appears that Petitioner raised this claim on direct appeal purely as a state law claim and that the state court decided it on state law grounds, the final paragraph of the claim as presented in his direct appeal brief supports his position that it was also raised as a constitutional violation. Therefore, the Court will treat this claim as one that was properly raised in state court on other than state grounds and therefore will address this claim.

In his habeas petition, Petitioner argues that the exclusion of Ms. Woods's testimony is a clear violation of *Chambers v. Mississippi*, 410 U.S. 284 (1973). The Tennessee Supreme Court addressed the issue of the exclusion of Ms. Woods's testimony on direct appeal by first stating the argument made by each party. Each party's argument relied on state law. However the Tennessee court then proceeded to a discussion of the Hunley tape. After addressing the exclusion of the tape based on *Chambers v. Mississippi*, the Tennessee Supreme Court determined "[n]o error occurred in excluding the testimony of Libby Woods or the alleged Hunley tape." *State v. West*, 767 S.W.2d 387, 396 (Tenn. 1989). Therefore, although it appears that the Tennessee Supreme Court failed to address the claim

regarding the exclusion of Ms. Woods's testimony on a constitutional basis, the Court finds that if the Tennessee Supreme Court did make its determination on a constitutional basis, the decision was neither contrary to nor an unreasonable application of clearly established federal law.

In further support of the position that the Tennessee Supreme Court did analyze both pieces of evidence under *Chambers*, the Court observes that the state court based its conclusion on the fact that the guilt of Martin, Petitioner's co-defendant, did not exonerate Petitioner, who was present, participating, aiding, and abetting. The state court determined the Petitioner's defense that his participation was commanded at gunpoint by Martin would not have been corroborated by the excluded evidence, which arguably would have shown Martin had a motive to kill the young victim.

In *Chambers*, the United States Supreme Court concluded the defendant had been denied a fair trial by the Mississippi court's application of the hearsay rule, which totally excluded statements against penal interest, and the voucher rule. These rules prevented Chambers from having the benefit of the testimony of three witnesses to whom McDonald confessed he committed the murder, and the cross examination of McDonald, who had confessed to the murder and later repudiated his written confession. The Tennessee Supreme Court observed that in *Chambers* the United States Supreme Court was clearly influenced by the fact that the confession by McDonald tended to incriminate McDonald and exculpate Chambers because the evidence made it

clear that only one person was responsible for the shooting death of the policeman. In addition, the Tennessee Supreme Court noted that in *Chambers*, the declarant, McDonald, was available for cross examination, "whereas Martin, the declarant here, was unavailable to the State or the defendant as he would have unquestionably invoked the privilege against self-incrimination." *State v. West*, 767 S.W.2d at 396. Additionally, the Tennessee appellate court determined there was a question of corroboration and reliability. This Court finds that the record is silent as to any corroboration, trustworthiness, or reliability of Libby Woods's proposed testimony.

Ms. Woods's proposed testimony was summarized by defense counsel during trial as the following:

> Miss Woods is a young lady who is a friend and acquaintance of both Shelia Romines, the younger victim in this case, and Mr. Ronnie Martin. I am searching for the investigative report on her right now. But, basically speaking, she would testify as to certain statements made by Mr. Martin to the effect that Mr. Martin would kill Shelia Romines, that he was upset with her for embarrassing him on one occasion where Shelia actually struck him in front of some other children at school; that he wanted to date her and he wanted to have sex with her and she resisted his advances and that he said on several occasions that he would kill her and he also specifically - and I believe

> this would tie in specifically with Mr. West's testimony - that he said that he owed her - that he owed her. And that is why he would kill her. That would be the ... tenor of her - and scope of her testimony.

[Addendum No. 12, pp. 62-63].

The trial court determined that Ms. Woods's testimony was hearsay and did not come under any exception to the hearsay rule. In addition, the trial court observed that such testimony could not be admitted under *Chambers*.

Pursuant to AEDPA, a writ of *habeas corpus* cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication was contrary to or involved an unreasonable application of clearly established federal law. The federal law that applies to this claim is, as previously stated, *Chambers v. Mississippi*. In *Chambers*, the defendant attempted to defend himself on two theories. First, Chambers endeavored to demonstrate that he did not shoot the victim. Second, Chambers attempted to demonstrate that McDonald was the shooter. Chambers was only allowed to present part of his defense. A lifelong friend of McDonald's, Sam Hardin, testified he saw McDonald shoot the victim. One of the victim's cousins testified he observed McDonald with a pistol in his hand immediately after the shooting. However, Chambers was not permitted to introduce evidence that McDonald had repeatedly confessed to the crime. On four separate occasions McDonald had

admitted responsibility for the murder. On one occasion McDonald gave a sworn statement to Chambers's counsel and the other three statements were made to friends during private conversations. Chambers was prevented from presenting the statements by the strict application of certain Mississippi rules of evidence.

At trial, Chambers called McDonald and had his sworn out-of-court confession admitted into evidence and read to the jury. On cross examination, the state elicited testimony from McDonald that he had repudiated his prior confession. McDonald further testified:

> [H]e [McDonald] did not shoot Liberty, and that he confessed to the crime only on the promise of Reverend Stokes that he would not go to jail and would share in a sizable tort recovery from the town. He also retold his own story of his actions on the evening of the shooting, including his visit to the café down the street, his absence from the scene during the critical period, and his subsequent trip to the hospital with Chambers.

Chambers v. Mississippi, 410 U.S. 284, 291 (1973).

The court denied Chambers's request to examine McDonald as an adverse witness finding that although McDonald might have been hostile, he was not adverse. The Supreme Court of Mississippi upheld the decision that McDonald was not adverse because he never indicated Chambers was the killer. Three of McDonald's friends were not allowed to

testify about admissions McDonald made to them. All three of them would have testified that McDonald stated he killed the victim. In addition, one of the witnesses would also have testified McDonald told him he disposed of the 22-caliber revolver after committing the murder, and that he accompanied McDonald several weeks after the shooting on a trip to purchase another .22 pistol to replace the one he discarded. The Mississippi Supreme Court approved the exclusion of the witnesses' testimony on hearsay grounds.

The United States Supreme Court summarized Chambers's problem "[a]s a consequence of the combination of Mississippi's 'party witness' or 'voucher' rule and its hearsay rule, he was unable either to cross examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity." *Chambers v. Mississippi*, 410 U.S. at 294. The Supreme Court further observed that although Chambers was able to cast some doubt on McDonald's story, "Chambers' [s] defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted." *Id.*

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' It is, indeed, 'an essential and fundamental requirement for the kind of

> fair trial which is this country's constitutional goal.' Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into questions the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.

Id. at 295 (citations omitted).

The *Chambers* Court observed that the state's proof at trial excluded the theory that more than one person participated in the shooting of Liberty. In addition, McDonald's confession tended to incriminate him and exculpate Chambers. Also, "in the circumstances of this case, McDonald's retraction inculpated Chambers to the same extent that it exculpated McDonald. It can hardly be disputed that McDonald's testimony was in fact seriously adverse to Chambers." *Id.* at 299. The United States Supreme Court determined that the state court's ruling prohibiting Chambers from cross-examining McDonald in addition to the refusal to permit him to call other witnesses was incorrect. The Supreme Court held "that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." *Id.* at 302.

In the case before this Court, Libby Woods's proffered testimony did not exculpate Petitioner. Ms. Woods would have testified that she heard Martin

threaten to kill Miss Romines and she heard Martin tell Ms. Rommes he owed her. However, there is nothing in her proposed testimony that exculpated Petitioner. Unlike *Chambers*, the proof by the State of Tennessee at trial did not exclude the theory that more than one person participated in the murder. Dr. Blake, the forensic pathologist who performed the autopsies, testified that in his opinion, the total injuries were inflicted by two individuals. He supported his conclusion as follows:

> At the examination of these persons at the scene I noted carefully the position of the mother, the clothing on the mother, and especially the position of the daughter, the fact that some of these injuries were inflicted while she was on the bed and others while she was on the floor, due to the drainage patterns of the blood. The injuries which had been inflicted by the time Shelia Romines was on the floor, were not only inflicted on the bed. The blood loss would have been different had the stab wounds to the chest been inflicted on the bed, she would not have left the bed. I think stab wounds were inflicted in both places, both on the bed and on the floor. The fact that there are torture type wounds and that is the only term I know to use for these little thick shaped triangular punctures of the skin that are present on the back of Shelia Romines, and as I say, on the back of Wanda Romines and on the front of

Shelia Romines. These are restraining type injuries to keep a person immobilized, to keep them still. A knife stuck into the skin is very effective to turn to move them and I see these type of wounds on the back of Shelia Romines and on the back of Wanda Romines, these small stab penetrations. There is no intent by a - these do not indicate the intent to push a knife through the skin or to stab a person. That is a holding pattern, if you will. And on the front of Shelia Romines, there are eight (8) or nine (9) of these. So, my conclusion is that two people were involved in the infliction of the wounds, as well as participating in keeping these two women separated until they were probably both brought to the end of their lives, with these horrible stab wounds.

The depths and widths of the wounds as I have described them, including the abrasion margins which gives me a handle on how wide the knife is, and I know how deep the wound is in each of the cases because I followed it and measured it, it is my opinion that two (2) different knives were used in the infliction of the wounds on Shelia Romines. Not so on Wanda Romines. I cannot draw that conclusion scientifically. There are various size wounds, but none of them have the

> characteristics on the surface that would clearly separate a narrow knife from a wide knife. In other words, the wider slash wounds on the mother, Wanda Romines, could have been made by thrusting a knife in and pulling it sideways. If I make myself clear.
>
> These wounds did not have the characteristic abrasion margins to clearly define the width of the inflicting weapon on Wanda Romines that they did on Shelia Romines. All of the wounds on Wanda Romines could have been inflicted by a single knife pushed to a quarter of an inch in the skin as a torture, shoved through the skin two (2) inches or shoved all the way down five (5) inches to transect the right common iliac artery and cause death.

[Addendum No. 9, pp. 67-69]. On cross-examination Dr. Blake further explained:

> I stated that in my opinion, after looking at the entire scene, the examination of the injuries, the fact that one had been tied, the fact that one had been raped, the fact that the stab injuries were both on the front and rear, the fact that there were - they were a deterrent type of stab penetrations on the skin on the front of Shelia Romines and on the back of Wanda Romines, that it was my opinion that more than one person was involved

> in the total act. It was further my statement and strong opinion that more than one knife was used on Shelia Romines. One or more knives may have been used, one knife definitely was used on Wanda Romines. One or more knives could have been used, but I can't state that with any scientific certainty.

[Addendum No. 9, p. 80].

In addition to this testimony, the proof that Petitioner never attempted to contact the authorities to tell them of the crime, his alleged innocence, and the alleged threats against his family further supports the State's theory that he was one of the perpetrators of these crimes. Petitioner had numerous opportunities to try to prevent the crimes from occurring and to report the crimes. The proof is that Petitioner did neither. In addition to the opportunities he had during the commission of the crime and driving away from the crime scene, Petitioner testified he did not contact the police when he returned home because he "was tired, bushed, wasn't really even thinking and [he] didn't know who that other guy[17] was" [Addendum No. 11, p. 99]. The fact that Martin had a motive to kill the young victim does not provide evidence that Petitioner did not participate in the crime.

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[17] When his attorney asked Petitioner which other guy he was talking about, he said "[a]t that house that we stopped at earlier that night." [Addendum No.11, p. 99].

The Tennessee Supreme Court discussed state law in relation to Libby Woods's proffered testimony. The court specifically noted that the State claimed the hearsay testimony that would be attributed to the co-defendant would be cumulative because the State conceded the co-defendant's guilt, and the testimony of Libby Woods would not have proved Petitioner was innocent. The State argued both defendants were guilty [Addendum No. 12, pp. 87-117]. Petitioner was indicted as a principal, and the trial court observed that it would have to determine at the end of the proof whether to include a charge as to aider and abettor [Addendum No. 3, p. 9]. The trial court did give an aider and abettor jury instruction [Addendum No.13, pp. 42-43]. The Tennessee Supreme Court did not discuss federal law when determining that the exclusion of Libby Woods's testimony was not error. However, the Tennessee Supreme Court did note that the guilt of Martin would not exonerate Petitioner or prove that Petitioner was forced to participate at gunpoint.

Although the proof was that Martin knew the young victim prior to the crime and there was no proof that Petitioner had ever met the victims prior to the crime [Addendum No. 10, p. 90], there was substantial evidence to support the finding that both Petitioner and the co-defendant participated in the killing of the victims.[18] The state court correctly

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[18] In addition to the testimony of Dr. Blake that it was his opinion, after performing the autopsies on the victims, that the total injuries were inflicted by two individuals, the Court also observes that the victims were bound and Petitioner was not; the victims were brutally stabbed and murdered, Petitioner was

determined that Libby Woods's testimony neither exonerates Petitioner nor proves he was forced to participate at gunpoint. Therefore, the testimony of Libby Woods would not have exculpated Petitioner, would not have exonerated Petitioner, nor would it have indicated Petitioner was not guilty. This allegedly favorable evidence cannot reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict. Therefore, the Court cannot find that Petitioner's due process rights were violated when Libby Woods's testimony was excluded.

Consequently, this Court finds the state court's determination regarding Libby Woods's testimony did not involve an unreasonable determination of the facts in light of the state court evidence and was neither contrary to nor based on an unreasonable application of *Chambers v. Mississippi*. Accordingly, Petitioner's claim that the trial court erred when it excluded Libby Woods's testimony will be **DISMISSED** on the merits.

b. Exclusion of the Hunley Tape (Amd. Pet. ¶ IB.2)

Petitioner claims the state trial court also erred when it excluded the tape of the alleged confession Martin made to Steve Hunley, a prison inmate. According to Petitioner, Martin confessed to committing both murders of which Petitioner is

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not; and Petitioner, by his own admission, had weapons in his hands but never attempted to stop Martin or prevent the crimes from occurring.

convicted, and Martin also stated the Petitioner did not commit the murders. The trial judge determined the tapes were hearsay and inadmissible because they were not subject to any hearsay exception.

Although Martin states on the tape that Petitioner did not kill the victims, Martin does not state that Petitioner did not assist Martin or that Petitioner did not rape Miss Romines. The taped statement does not exonerate Petitioner from the crimes; it only indicates Petitioner may not have actually killed the victims. The pertinent part of the taped conversation follows:

Hunley: Hey Ronnie.

Ronnie: Yeah?

Hunley: One more time before I go to bed to ease my mind, Steve do that shit?

Ronnie: No.

Hunley: Huh?

Ronnie: No.

Hunley: O.K. Thank you.

Hunley: These guys back here don't believe me that you said Steve didn't kill them women. Will you tell them you did?

Unknown: (neither West nor Hunley): Who's back there?

Hunley: All of us.

Ronnie: Yeah, I did it.

Hunley: You killed both them women?

Ronnie: Yeah.

Hanley: Why?

Ronnie: I don't know. I don't want to talk about it.

[Court File No. 67, Addenda 11-14, Attachment "B"].

The defense argued that this was a statement against interest which is an exception to the hearsay rule when a declarant is unavailable. According to Petitioner, this taped conversation should have been admitted into evidence as an exception to the hearsay rule and pursuant to *Chambers v. Mississippi*. The trial court excluded the Hunley tape on the grounds that it was hearsay and was not admissible under any exception to the hearsay rule [Addendum No. 12, pp. 62-71]. The trial court made the following ruling:

> I am not aware of any exception to the hearsay rule that would justify the Court in permitting either the tapes or the testimony of the witnesses you refer to into this record. This is clearly not a Chambers' situation. It just simply isn't, and they are hearsay and certainly the Court can see no reason that they should be admitted in evidence in this case anymore than any other hearsay since they don't fit any of the exceptions to the rule.

[Addendum No. 12, pp. 69-70].

On direct appeal the Tennessee Supreme Court determined that no error occurred in excluding the

Hunley tape. The Tennessee Supreme Court applied the applicable federal law as announced in *Chambers v. Mississippi* when it analyzed the claim that Petitioner was deprived of due process when the trial court refused to admit the tape which was against Martin's penal interest. As previously discussed, in *Chambers* the United States Supreme Court reversed a Mississippi state court conviction when, on the basis of the state's hearsay rule, the state court refused to admit testimony that someone else had committed the crime. The Supreme Court found the proffered testimony to be trustworthy and admissible under a common exception to the hearsay rule, *i.e.*, declarations against interest. A declaration against interest is an exception to the hearsay rule that is based on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made. Although Mississippi recognized this exception, it did so only to declarations against pecuniary interest. The *Chambers* Court determined the excluded testimony was critical to Chambers's defense.

> The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of reliability. First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case -- McDonald's sworn confession, the

testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest. . . . McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three friends and he must have been aware of the possibility that disclosure would lead to criminal prosecution. Indeed, after telling Turner of his involvement, he subsequently urged Turner not to 'mess him up.' Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury. . . . The availability of McDonald significantly distinguishes this case from the prior Mississippi precedent, *Brown v. State*, *supra*, and from the *Donnelly*-type situation, since in both cases the

declarant was unavailable at the time of trial.

Chambers v. Mississippi, 410 U.S. at 300-301. The *Chambers* Court found that the testimony rejected by the trial court "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest." *Id.* at 302.

The hearsay statements involved in Petitioner's case were not made under circumstances that provide considerable assurance of their reliability. The Tennessee Supreme Court first observed that the taped statement did not exonerate Petitioner. Petitioner was present, participating, aiding, and abetting in the crimes that were committed, and the Hunley tape did not corroborate his defense that his participation was forced at gunpoint. The Tennessee court also observed that the declarant in *Chambers* was available for cross examination and Martin, the declarant in Petitioner's case, was unavailable since he unquestionably would have invoked the privilege against self-incrimination. In addition, the Tennessee Supreme Court determined that the record was silent as to corroboration and reliability, and it had previously rejected the argument that *Chambers* requires the admission of uncorroborated hearsay statements against penal interest. Therefore, the Tennessee Supreme Court determined the exclusion of the Hunley tape was not error. *See State v. West*, 767 S.W.2d 387, 396 (Tenn. 1989).

Petitioner avers the exclusion of the Hunley tape placed him in the same situation as Chambers.

Petitioner claims the tape was admissible as a declaration against penal interest and that the recorded statements were proven reliable by the fact the co-defendant had no motive to lie; Martin had knowledge of the facts; the statements were recorded on a tape; and the person who recorded the statements was available as a witness. The claim that Martin had no motive to lie, however, is not proof of the reliability of the statement. Moreover, Martin did not say Petitioner did not assist or help. There is nothing to indicate that Martin understood he was subjecting himself to "real criminal liability" especially since he was in prison and apparently had no idea his statements were being taped. *See United States v. Alvarez*, 266 F.3d 587, 592-93 (6th Cir. 2001). In addition, the record indicates Martin's original statement to the authorities did not exculpate Petitioner.

Further, the assurances of reliability from the *Chambers* case are not present in this case. In *Chambers* each of McDonald's confessions were made spontaneously to a close acquaintance shortly after the murder had occurred. In the case before this Court, Martin's alleged confession was made when he was questioned by Hunley, a prison inmate, while he was in prison and in the presence of other inmates. There is nothing about Martin's situation that provides considerable assurance of the reliability of the alleged confession. In *Chambers* McDonald's confessions were corroborated by some other evidence in the case, *i.e.*, the confession was made to several of his friends shortly after the murder, he was seen with a gun immediately after

the shooting, and he was available for cross examination. Here, the only other evidence that arguably corroborates Martin's alleged confession is one of Petitioner's statements. Moreover, the *Chambers* court observed that the "availability of McDonald significantly distinguishes this case from the prior Mississippi precedent, *Brown v. State, supra*, and from the *Donnelly*-type situation, since in both cases the declarant was unavailable at the time to trial." *Id.* at 300. Similarly, the case before the Court, it appears that Martin was unavailable and his statement lacked assurances of reliability.

In *Dutton v. Evans*, 400 U.S. 74, 78 (1970), the United States Supreme Court identified factors which must be considered in determining whether a statement may be placed before the jury where there is no confrontation of the declarant. "These factors include: (1) whether the hearsay statement contained an express assertion of past fact, (2) whether the declarant had personal knowledge of the fact asserted, (3) whether the possibility that the statement was based upon a faulty recollection is remote in the extreme, and (4) whether the circumstances surrounding the statement made it likely that the declarant fabricated the assertion of fact." *Anthony v. DeWitt*, 295 F.3d 554, 563 (6th Cir. 2002), citing *Dutton*, 400 U.S. at 88-89.

Under the circumstances of this case, this Court cannot say that the circumstances surrounding the Hunley taped statement made it unlikely that Martin fabricated the statement. Apparently Martin, a juvenile, was being questioned and asked to confess in the presence of several other inmates. There is

nothing to indicate that Martin thought his statements were being taped or that he was subjecting himself to criminal liability, thus, bringing the trustworthiness of such statement into question. The Tennessee Supreme Court observed:

> [T]here is the question of corroboration and reliability. The so- called Hunley tape was a conversation between Martin and Hunley, a prison inmate, and was recorded by some other unidentified person in the prison, without Martin's knowledge. This record is completely silent as to any corroboration whatever of the alleged statements of Martin on the Hunley tape. In *Smith v. State*, 587 S.W.2d 659 (Tenn. 1979) we held that 'hearsay declarations against penal interests made by an unavailable declarant, to be admissible, must be proven trustworthy by independent corroborative evidence that bespeaks reliability.' *Id.* at 661.

State v. West, 767 S.W.2d 387, 396 (1989). Apparently Martin's statements to the police implicated both Petitioner and Martin. In addition, there was testimony that two people committed the murder. Moreover, the facts of the case support the theory that two people committed this crime.

This Court does not find that the state court either contravened or unreasonably applied clearly established federal law. The hearsay statements were not proven to be inherently trustworthy or

inherently reliable. The Court does not find that the trial court unreasonably applied *Chambers*, and the state court's conclusion to exclude the statement was not an unreasonable application of United States Supreme Court precedent. Consequently, Petitioner is not entitled to any habeas relief on this exclusion of evidence claim which will be **DISMISSED**.

c. Erroneous Denial of Motion to Bring Ronnie Martin to Court for the Jury to View (Amd. Pet. ¶ I.E)

Petitioner avers that the trial court violated his constitutional rights when it denied his motion to have his co-defendant, Ronnie Martin, brought before the jury for viewing after allowing the State to introduce a demonstrative exhibit and photographs that inaccurately portrayed the size of Petitioner and Martin.[19] Petitioner claims the State introduced a chart which portrayed the body size and weight of Petitioner and Martin inaccurately. The State introduced a drawing from a medical book, without any objection from the defense, depicting the body of a very young boy next to the body of a fully developed man. The State specified the drawings were not to scale but were being introduced for the purpose of

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[19] West was a six foot one inch, one hundred and fifty to one hundred and seventy pound, twenty-three year old at the time he committed these crimes. Martin was a five feet ten inch, one hundred and forty pound, seventeen year old at the time he committed these crimes. It appears that the defendants told the officer their weights when they were arrested [Addendum No. 11, p. 23]. However, Petitioner testified he had never weighed more than one hundred and fifty pounds [Addendum No. 22, p. 128].

illustrating the respective age, height, and weight of Petitioner and Martin [Addendum No. 11, pp. 19-23]. In addition, Petitioner claims photographs that were introduced into evidence did not accurately portray the sizes of the two men and were extremely misleading. Petitioner made an oral motion to have Martin brought to court, but the court determined he could not be introduced as an exhibit and declined to order him brought for exhibition before the jury [Addendum No. 12, pp. 76-77]. Petitioner contends the trial court's exclusion of Martin for exhibition before the jury violated his constitutional rights. This Court observes that it does not appear that Martin was subpoenaed and served. There is no proof that a summons had been issued or that a subpoena had been executed on Martin prior to trial.

Petitioner raised this issue on direct appeal, claiming the trial judge violated his right to compel a witness to appear as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution [Addendum No. 16, pp. 71-72]. The state appellate court, citing *Bacon v. State*, 385 S.W.2d 107 (1964), determined Petitioner did not demonstrate any violation of the right to compulsory process. The appellate court determined Petitioner was not denied compulsory process by the trial judge. Although Petitioner's motion requesting that the trial court order Martin's attendance was denied, Petitioner was not prevented from subpoenaing Martin. Petitioner made an oral motion during trial rather than issuing a subpoena prior to trial for Martin's appearance.

The United States Supreme Court has described the Compulsory Process Clause as follows:

> The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly. There is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment-its availability is dependent entirely on the defendant's initiative. Most other Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case. While those rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct.

Taylor v. Illinois, 484 U.S. 400, 410 (1988).

The defendant's right to present exculpatory evidence is subject to essential limitations on the

right for the orderly presentation of the case.[20] The *Taylor* Court further observed that "[t]he State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence." *Taylor* at 411.

Although Petitioner had a constitutional right to compulsory process in his state trial, the Sixth Amendment does not guarantee a criminal defendant the right to compel the attendance of any and all witnesses. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 n.7 (1982). During trial Petitioner presented a defense of duress. Petitioner alleged he was forced to have sexual intercourse with the young victim under threat of death or injury from a deadly weapon employed by Martin. It was foreseeable that the prosecution would counter with evidence relative to the size, weight, and age of Petitioner and Martin. On cross examination the State's witness testified the chart was not draw to scale and did not accurately portray the size of the Petitioner and Martin. The witness also admitted the drawings did not accurately portray the body build of each defendant. The witness agreed that Martin was not slim [Addendum No. 11, pp. 20-23]. Therefore, defense counsel discredited the exhibit as accurately portraying the sizes of the Petitioner and Martin.

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[20] It has not been demonstrated that the alleged evidence was exculpatory since the testimony included the true body sizes of Petitioner and Martin.

Petitioner's counsel made an oral motion to exhibit Martin to the jury which was denied. There is no evidence that Petitioner was denied compulsory process. Petitioner has not alleged or demonstrated that a subpoena was timely served on Martin pursuant to Rule 17 of the Tennessee Rules of Criminal Procedure. Consequently, since he failed to subpoena Martin, Petitioner's constitutional right to compulsory process was not violated.

Even assuming for discussion purposes that the trial court would have refused to permit Petitioner to call Martin even if he had been properly subpoenaed, then arguably, subpoenaing Martin would have been useless. Interpreting the colloquy between the trial court and Petitioner's trial counsel as proof that the court would have refused to permit Petitioner to call Martin, then Petitioner should not be penalized for not pursuing a futile and wasteful process. *See United States v. Walls*, 162 F.3d 1162 (6th Cir. 1998) (unpublished table decision), *available in* 1998 WL 552907. However, more than mere absence of testimony or evidence is necessary to establish a violation of the compulsory process guaranteed by the Sixth Amendment. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

"[T]he Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining *witnesses in his favor.*'" *Id.* at 867 (Emphasis in original). To prove a constitutional violation of the Compulsory Process Clause of the Sixth Amendment, Petitioner must demonstrate that the evidence he

was denied would be material and favorable to his defense, *id.* at 873, and "the acts complained of must be of such a quality as necessarily prevents a fair trial." *Id.* at 872. Here, Petitioner's trial counsel effectively cross examined the State's witness who testified the exhibit did not actually portray the physics or body build of Martin and Petitioner. The State's witness also testified as to the allegedly true size of Martin and Petitioner. Thus, Petitioner has failed to demonstrate that he was prejudiced by the state trial court's denial of his motion to produce Martin for the purpose of being exhibited to the jury. In addition, it appears that the production of Martin would have been cumulative evidence. Therefore, this Court does not find that Petitioner demonstrated his Sixth Amendment right to compulsory process was violated. *Id.* at 867.

Petitioner has failed to cite any clearly established federal law as determined by the United States Supreme Court that is contrary to, or was unreasonably applied, by the Tennessee Supreme Court when it determined Petitioner was not denied his constitutional right to compulsory process. This Court finds the Tennessee Supreme Court's conclusion was neither contrary to nor an unreasonable application of federal law nor was the state court's conclusion an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, this Court will **DISMISS**. on the merits the Petitioner's claim of denial of compulsory process and **GRANT** Respondent's motion for summary judgment on this claim.

2. Prosecution Minimized the Jury's Responsibility for Imposition of the Death Sentence (Amd. Pet. ¶ II)

Petitioner claims the prosecutor minimized the jury's responsibility for the imposition of the death penalty in violation of the cardinal principles of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Petitioner avers that the prosecutor minimized the jury's sentencing role when he told the jury the death penalty law was self-executing. Petitioner is complaining about the following statements, underlined and bolded, made by the prosecutor:

> The decision you are going to be called upon to make obviously is very serious, ***it is one of the most serious you will ever make.*** But, on the other hand, if you will listen to what the Judge tells you the law is, you will see that it is not necessarily a difficult decision in that sense. ***In the application of the law. Because the law provides certain guidelines, certain perimeters within which you are to consider the verdict, your secondary verdict in this case. And basically that rests with a decision of fact.*** The weighing of fact, the discerning of what side proof-wise outweighs the other.
>
> ***See, the law in Tennessee, and the law of the land, in this sense, is self-executing. in the sense that the law mandates, requires a death sentence***

> ***in certain situations,*** unless it is outweighed by other factors.
>
> The law is clear. Your responsibility once again is to weigh proof, to make a finding of fact, apply the applicable law to those facts and ***the law provides the punishment, not you, not you. You do not set punishment in this case, per se. You make decisions based upon fact and the law, self-executing, based upon your weighing the facts.***

[Addendum No.13, pp. 137-38]. Other instructions challenged by Petitioner include the following:

> I am not going to stand here and tell you that that is an easy application of the law, because it is not. It is a difficult application. ***But, just keep in mind, you don't impose the sentence, the law provides the sentence, you are merely finders of fact.***

[Addendum No. 13, pp. 140]. In addition, Petitioner attacks the arguments by the prosecutor regarding aggravating and mitigating factors. The State identified the three aggravating factors shown by the proof, *i.e.*, the murder was especially heinous, atrocious, or cruel, in that it involved torture or depravity of mind; the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the defendant or another, and the victims were brutally murdered to cover up the rapes [Addendum No. 13, pp. 138-39]. The State then discussed the jury's role in weighing

the aggravating and mitigating factors under the statute:

> As the law states, and the Judge will tell you this, once the State proves aggravating circumstances, one or more, beyond a reasonable doubt, if they are not outweighed by mitigating circumstances the defendant shows you, the punishment shall be death. That is a matter of law. It is a matter of law.
>
> I am not going to stand here and tell you that that is an easy application of the law, because it is not. It is a difficult application. But, just keep in mind, you don't impose the sentence, the law provides the sentence, you are merely finders of fact.

[Addendum No. 13, p. 140].

Petitioner claims that these statements made by the prosecutor, along with other arguments, violated the principles of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Petitioner did not challenge the mitigating and aggravating arguments in his claim on direct appeal. Therefore, since Petitioner procedurally defaulted the portion of the claim challenging the mitigating and aggravating arguments made by the prosecutor, the Court will not address that part of the claim. *See Alley v. Bell*, 101 F.Supp.2d 588, 623 (W.D. Tenn. 2000) (Petitioner's *Caldwell* claim which relied on additional comments raised for the first time in federal court to support the claim were barred by

procedural default), *aff'd* 307 F.3d 380 (6th Cir. 2002).

As to the portion properly before this Court, the Tennessee Supreme Court correctly determined that any alleged improper comment made by the prosecutor during the death penalty sentencing hearing which made the jury less responsible for imposing the death sentence is subject to a two-step test. First, it must be determined whether the prosecutor's comments were such that they would "minimize the jury's sense of responsibility for determining the appropriateness of death" and second, whether the trial judge corrected the erroneous impression left by the prosecutor. *See Caldwell v. Mississippi*, 472 U.S. at 338-41; *Mann v. Dugger*, 844 F.2d 1446, 1456 (11th Cir. 1988).

On direct appeal, the Tennessee Supreme Court made the following findings:

> We agree that the district attorney's statements that 'the law is self-executing', that the law 'provides the punishment, not you', and the concluding statement that 'you don't impose the sentence, the law provides the sentence, you are merely finders of fact', violate *Caldwell*. Such statements minimize the jury's role and allows them to feel that the responsibility for a death sentence rests elsewhere.
>
> We must determine whether the trial judge sufficiently corrected the impression left by the prosecutor. The

> trial judge responded to defendant's objection by reminding the jury that the court 'was the proper source from which you get the law', and that statements concerning the law should not be 'considered authoritative when presented by argument of counsel'. The trial judge correctly instructed the jury with respect to their responsibility in determining the death penalty. Other portions of the state's argument and the defendant's argument correctly set forth the responsibility of the jury, in accord with Tennessee's capital sentencing procedure. We are of the opinion that the three or four brief erroneous characterizations of the jury's role in determining the appropriateness of a death sentence were sufficiently corrected by the trial judge and the accurate portions of the district attorney's and the defendant's arguments stressing the proper responsibility of the jury. These clarifying measures contrast sharply with the situation in *Caldwell v. Mississippi, supra* where the trial judge endorsed the prosecutor's remarks. Thus we find that the errors were harmless beyond a reasonable doubt.

State v. West, 767 S.W.2d 387, 399-400 (Tenn. 1989).

Petitioner's argument that the state court's determination was contrary to, or an unreasonable application of, *Caldwell* because one-third of the State's initial argument and penalty phase of this

trial consisted of argument which served only to minimize the jury's role in the sentencing process is unsupported by the record. It appears that the prosecutor was seeking to comfort the jury and tell the jurors they personally were not putting Petitioner to death, but they were part of the system and had to apply the sentencing law. Much of the prosecutor's argument was a correct statement of the law.

Arguably, in the case before this Court, the prosecutor tried to diffuse the jury's moral responsibility for the death penalty rather than mislead the jury into thinking that it had a reduced role in the sentencing process. This was the finding of the Tenth Circuit in the case of *Parks v. Brown*, 860 F.2d 1545, 1550 (10th Cir. 1988), *rev'd on other grounds, sub nom. Saffle v. Parks*, 494 U.S. 4841 (1990), based on the following arguments made by the prosecutor:

> But, you know, as you as jurors, you really, in assessing the death penalty, you're not yourself putting Robyn Parks to death. You just have become a part of the criminal-justice system that says when anyone does this, that he must suffer death. So all you are doing is you're just following the law, and what the law says, and on your verdict—once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just part of the criminal-justice system that says that when this type of thing

> happens, that whoever does such a horrible, atrocious thing must suffer death.
>
> Now that's man's law. But God's law is the very same. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know.

Id. at 1550. Parks argued the above statements were impermissible under *Caldwell* because they minimized the jury's sense of its actual responsibility for the sentencing decision. The Tenth Circuit disagreed, and determined that none of the prosecutor's statements could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. In addition, the Tenth Circuit in *Parks* observed that, unlike the trial court in *Caldwell* which compounded the minimization of the jury's sense of its actual responsibility, the *Parks* trial court clearly and unequivocally instructed the jury that the sentencing responsibility rested with the jury. The prosecutor's arguments in the *Parks* case appear to be more on point with the case before this Court than the *Caldwell* case.

The issue in *Caldwell* was identified by the Supreme Court of the United States as "whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Caldwell*, 472 U.S. at 323. The Supreme Court determined "that it is

constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rest elsewhere." *Id.* at 328. In *Caldwell* the Court was referring to the jury being led to believe that if they mistakenly sentenced a defendant to death they did not need to worry because it would be corrected on appellate review of the death sentence. The Supreme Court has explained that a defendant must show the remarks to the jury improperly described the role assigned to the jury by local law in order to establish a *Caldwell* violation. *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Not every improper prosecutorial remark renders a trial unfair. *See Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

In *Caldwell* the prosecutor's argument was inaccurate, misleading, and not linked to any valid sentencing consideration. The Court determined "[t]he argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a captial sentencer must perform." *Caldwell*, 472 U.S. at 336. In the case before this Court, the prosecutor argued to the jury that the jury did not impose the sentence, the law provided what the sentence would be, and the jury was merely finders of fact. Petitioner's defense counsel objected to the prosecutor instructing the jury on the law and the trial court advised the jury that the court was "the proper source from which you get the law, and it is

not to be considered authoritative when presented by argument of counsel" (Addendum No.13, pp. 140-41).

Further, while the state court identified some of the prosecutor's statements as violating *Caldwell*, it does appear that the majority of the prosecutor's statements were accurate since the law in Tennessee provides that if the jury determines at least one or more statutory aggravating circumstances have been proven by the state beyond a reasonable doubt and such aggravating circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the sentence "shall" be death. TENN. CODE ANN. § 39-13-204. *See California v. Ramos*, 463 U.S. 992 (1983) (A California statute that required trial courts to inform capital sentencing juries that the governor could commute a sentence of life imprisonment without possibility of parole into a lesser sentence that included the possibility of parole was upheld as constitutional. The Supreme Court determined the instruction was accurate and relevant to a legitimate state penological interest *i.e.*, a concern for the future dangerousness of the defendant should he ever return to society, and that this legitimate sentencing concern gave the jury a valid interest in accurate information on the possibility of parole).

This Court agrees with the Tennessee Supreme Court's finding that the judge sufficiently corrected the statements that allegedly minimized the jury's role. The Tennessee Supreme Court observed that any erroneous characterizations of the jury's role in determining the appropriateness of a death sentence were sufficiently corrected by the trial judge. The

trial court correctly admonished the jury that the court was the proper source from which they were to get the law and any argument by counsel regarding the law was not to be considered authoritative. Consequently, the trial judge's admonition and jury instructions cured any alleged erroneous statements made by the prosecutor that minimized the jury's role and responsibility for the death penalty.

Prior to the sentencing phase, the state court instructed the jury that, as to the two counts of murder in the first degree of which they found Petitioner guilty, "[i]t is a part of your responsibility to consider and fix the punishment as to those two (2) counts" [Addendum No. 13, p. 60]. After presenting proof in the sentencing hearing, the prosecutor was making an opening argument when defense counsel objected to the prosecutor instructing the jury on the law. At that time, the state court advised the jury that "the Court is the proper source from which you get the law, and it is not to be considered authoritative when presented by argument of counsel" [Addendum No. 13, pp. 140-41]. During the jury charge, the court instructed the jury that it was responsible for fixing punishment and that the jury must determine whether the defendant would be sentenced to death or life imprisonment [Addendum No. 14, p. 8]. The jury was also instructed that it was solely and exclusively responsible for determining the weight to be given to the evidence presented [Addendum No. 14, p. 14]. The trial judge instructed the jury regarding the aggravating and mitigating circumstances. The trial judge instructed the jury to:

. . . consider, . . . whether there are any mitigating circumstances which inquiry shall include, but it is not limited, to the following subjects for examination by the jury:

1. The defendant has no significant history of prior criminal activities.

2. The defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.

3. The defendant acted under extreme duress or under the substantial domination of another person.

4. The capacity of the defendant to appreciate the wrongfullness [sic] of his conduct or to conform his conduct to the requirements of the law, was substantially impaired as a result of intoxication, which was insufficient to establish a defense to the crime, but which substantially affected his judgment.

5. Any other circumstance or circumstances found by the jury to be a mitigating circumstance.

[Addendum No. 14, pp. 11-12]. The trial court proceeded to instruct the jury that if the jury unanimously determined that at least one statutory aggravating circumstance had been proven by the State beyond a reasonable doubt and the aggravating circumstance or circumstances are not outweighed by

any sufficiently substantial mitigating circumstances, the sentence shall be death [Addendum No. 13, p. 12].

The trial court also instructed the jury that if the jury unanimously determined the statutory aggravating circumstance or circumstances proven beyond a reasonable doubt by the State are outweighed by one or more mitigating circumstance(s) then the punishment shall be life imprisonment [Addendum No. 14, p. 13].

The jury completed the Punishment of Death form and unanimously found the following:

I. The murder was especially heinous and atrocious in that it involved torture.

II. The murder was committed while the defendant was engaged in committing or was an accomplice in the commission of or was attempting to commit or was fleeing after committing or attempting to commit any first degree murder, rape, larceny, or kidnaping.

III. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

> In our opinion there was no mitigating circumstances substantial to outweigh the statutory aggravating circumstances or circumstances [sic] so found.

[Addendum No. 27, Exhibit 14].

The Tennessee Supreme Court determined that any alleged errors were corrected by the state trial

judge and thus were harmless beyond a reasonable doubt. *State v. West*, 767 S.W.2d 387, 399-400 (1989).

Petitioner has failed to establish the state court's decision involved an unreasonable determination of the facts in light of the evidence or, that the state court decision was contrary to, or involved an unreasonable application of, established federal law. Consequently, Petitioner's constitutional rights were not violated because of the alleged improper prosecutor's statements, as they were cured by the judge's admonishment and instructions. Thus, the Petitioner's claim regarding the prosecutor's statements will be **DISMISSED**, and the Respondent's motion for summary judgment will be **GRANTED.**

3. Ineffective Assistance of Counsel For Failing to Investigate Mitigating Evidence (¶ III.A)

Petitioner claims trial counsel failed to properly investigate his background and thus failed to present any significant mitigating evidence to the jury during the sentencing hearing. Petitioner claims that if his trial counsel had conducted a proper investigation, they would have discovered Petitioner was born into a family with a history of mental illness, substance abuse, and violence.

The evidence introduced during Petitioner's state post-conviction hearing will not be re-stated here since it is set forth in Section I.C. *supra*. That evidence includes testimony that Petitioner was raised in a family with a history of mental illness, substance abuse, and violence. The state appellate

court agreed with the state post-conviction court that Petitioner failed to show how he was prejudiced by any acts or omissions of counsel. Both state courts agreed that Dr. Engum's testimony reflected that petitioner's evaluation demonstrated there no signs of trauma or organic brain damage. *West v. State*, 1998 WL 309090, at *9 (Tenn. Crim. App. 1998). The state appellate court agreed with the state post-conviction court's determination that there was conflicting testimony regarding the existence of mitigating evidence that trial counsel failed to present and that, in light of the conflicting evidence, Petitioner failed to meet his burden with respect to the allegation of ineffective assistance of counsel at the sentencing phase. *Id.*

The criteria for analyzing a claim of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a defendant to demonstrate two essential elements: (1) counsel's performance was deficient (*i.e.*, counsel was not functioning as counsel guaranteed the defendant by the Sixth Amendment) and (2) counsel's deficient performance prejudiced the defense (*i.e.*, deprived the defendant of a fair trial rendering the outcome of the trial unreliable). *Id.* at 687-88; *see also McQueen v. Scroggy*, 99 F.3d 1302, 1310-11 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257 (1997); *Sims v. Livesay*, 970 F.2d 1575, 1579-81 (6th Cir. 1992); *Flippins v. United States*, 808 F.2d 16, 17-18 (6th Cir.), *cert. denied*, 481 U.S. 1056 (1987). To establish his attorney was not performing within the range of competence demanded of attorneys in criminal cases, a defendant must demonstrate the

attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88; *McMann v. Richardson*, 397 U.S. 759, 771 (1970). "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992); *see also West v. Seabold*, 73 F.3d at 84. There is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689; *Sims*, 970 F.2d at 1579-80.

"Reviewing courts focus on whether counsel's errors have undermined the reliability of and confidence that the trial was fair and just." *Austin*, 126 F.3d at 847 (citing *Strickland*, 477 U.S. at 687; *United States v. Cronic*, 466 U.S. 648, 658, (1984); *McQueen*, 99 F.3d at 1310-11). The Court cannot indulge in hindsight but must instead evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors. *Strickland*, 466 U.S. at 690; *McQueen*, 99 F.3d at 1311. Trial counsel's tactical decisions are particularly difficult to attack. *McQueen*, 99 F.3d at 1311; *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994). A defendant's challenge to such decisions must overcome a presumption the challenged actions might be considered sound trial strategy. *McQueen*, 99 F.3d at 1311; *O'Hara*, 24 F.3d at 828. Effective assistance of counsel is presumed, and the Court will not generally question matters involving trial strategy. *See United States v. Chambers*, 944 F.2d 1253, 1272 (6th Cir. 1991). "[R]eviewing court[s]

must remember that 'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Wong v. Money*, 142 F.3d 313, 319 (6th Cir. 1998) (quoting *Strickland*, 466 U.S. at 690).

To establish the prejudice prong, a petitioner must show that absent his attorney's errors, the result of his trial would have been different. *Lynott v. Story*, 929 F.2d 228, 232 (6th Cir. 1991). The Court must make an independent judicial evaluation of counsel's performance and determine whether counsel acted reasonably under all the circumstances. *McQueen*, 99 F.3d at 1311; *O'Hara*, 24 F.3d at 828; *Ward v. United States*, 995 F.2d 1317, 1321-22 (6th Cir. 1993); *Sims*, 970 F.2d at 1580-81. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the [ultimate] judgment." *West*, 73 F.3d at 84 (quoting *Strickland*, 466 U.S. at 691 (further citation omitted)).

Respondent contends Petitioner has not fairly presented this claim to the Tennessee appellate courts because he has submitted facts which were not before the Tennessee courts. Respondent asserts that numerous affidavits and reports relied upon by Petitioner in his federal habeas petition were not relied upon by him to support his ineffective assistance of counsel claim in his brief to the Tennessee Court of Appeals. Specifically, Respondent contends the affidavits of Keith Cruso, Debra West Harless, Karen West Bryant, Vestor West, Patty

Rutherford, the record from Community Hospital, reports of Dr. Coleman and Dr. Dudley, and Petitioner's military Form DD-214, were not relied upon in state court. Respondent argues that since Petitioner has presented significant new factual allegations in support of his claim that counsel's failure to conduct a reasonable investigation of mitigating evidence, Petitioner did not fairly present this claim to the Tennessee appellate courts. Consequently, Respondent asserts, although technically exhausted, this claim is procedurally barred. The substance of federal habeas corpus claims are required first to be presented to the state courts. *Picard v. Connor*, 404 U.S. 270, 278 (1971). Petitioner has submitted affidavits and evidence that were not presented to the Tennessee state courts.[21] Although Debra Gail Harless,[22] Petitioner's oldest sister, testified during Petitioner's state post-conviction hearing, it does not appear that her affidavit was presented to the state courts. However, other than naming other parties with knowledge of the abuse, it appears that Ms. Harless's testimony

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[21] The affidavits appear to be from relatives who did not testify in state court. The Court observes that Petitioner has failed to submit any medical records to support his allegations of abuse which allegedly led to medical surgeries. The Court inspected the records identified as Petitioner's medical records [Doc. 111, Attachment H], but was unable to determine if they are what Petitioner purports them to be.

[22] At the time of Petitioner's state post-conviction hearing Ms. Harless was identified as Debbie West, Petitioner's oldest sister.

during Petitioner's state post-conviction hearing was substantially the same as her affidavit.

As to the other evidence which was not presented to the state courts, Petitioner has offered no explanation as to why this new evidence was not presented to the state courts other than a general statement that "[a]ny additional facts included in the federal habeas petition are the product of Mr. West finally being afforded the resources necessary to litigate the claim and clearly serve to supplement and clarify the claim presented to the state courts" [Doc. 144, pp. 68-69].[23] The Court finds this explanation interesting, considering that Petitioner's counsel did not file anything in federal court until February 20, 2001, and the affidavit of Debra West Harless and the affidavit of Vestor West were prepared on December 31, 1998, more than two years prior to Petitioner "finally being afforded the resources necessary to litigate the claim" [Doc. 144].

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[23] A review of the Petitioner's state court record reveals that the following reports, affidavits, and records [Attachments to Doc. 111] were not relied upon by the Petitioner to support his ineffective assistance of counsel claim before the state post-conviction court:

Affidavit of Keith Caruso	Attachment F	Feb. 23, 2001
Affidavit of Debra West Harless	Attachment G	Dec. 31, 1998
Record from Community Hospital	Attachment H	undated
Affidavit of Karen West Bryant	Attachment I	Dec. 18, 2001
Affidavit of Vestor West	Attachment J	Dec. 31, 1998
DD-214	Attachment M	Mar. 4, 2002
Affidavit of Patty Rutherford	Attachment N	Feb. 11, 1001
Report of Dr. Coleman	Attachment GG	Nov. 7, 2001
Report of Dr. Dudley	Attachment HH	Feb. 21, 2002

Moreover, there is absolutely no explanation of why Vestor West did not testify during Petitioner's state post conviction hearing.

The affidavit of Keith Caruso, M.D. avers he reviewed records and based on his review, he believed it was reasonable for Petitioner to undergo an evaluation [Doc. 111, Attachment F]. The record that is purported to be from Community Hospital [Doc. 111, Attachment G] bears no indicia to substantiate that claim. The alleged record does not include the patient's name, the name of the hospital, or the name of the treating physician.

The affidavit from Petitioner's ex-wife [Doc. 111, Attachment I] claims she had long talks with Petitioner about the abused he suffered from his parents. This claim is directly contradicted by the statements Petitioner previously made to psychological experts that he has no knowledge of ever being physically abused.

The DD-214 was available to trial counsel who made a strategic decision not to introduce the record into evidence. It appears that contrary to Petitioner's argument that Petitioner's "military discharge record - which listed his 2 year, 8 month service as a combat engineer, awards of army service ribbon, marksman badge and sharpshooter badge, and a discharge under honorable conditions - could hardly have been prejudicial[,]" was in fact arguably very prejudicial in that the narrative reason for separation was explained as —"MISCONDUCT—PATTERN OF MISCONDUCT" [Doc. 111, Attachment M]. Consequently, the strategic decision by trial counsel

not to introduce Petitioner's military record was not deficient performance.

The affidavit of Patty Rutherford, Petitioner's boss when he worked at McDonald's, supplements her trial testimony, and there is no explanation as to why state post-conviction counsel did not present this information during the state post-conviction hearing. The psychological evaluation of Dr. Coleman, wherein she states that it is her "opinion that Mr. West was suffering from a mental disorder at the time of the offenses and that this mental disorder might have had relevance as a defense and/or mitigation issue at trial" was not introduced during the state post-conviction hearing [Doc. 111, Attachment GG], nor was the report of Dr. Dudley who expressed a similar opinion [Doc. 111, Attachment HH]. Petitioner has failed to explain why these documents were not presented to the state post-conviction court, and therefore he has failed to meet his burden to allow this Court to consider this new evidence.

As it does not appear that the above identified evidence was fairly presented to the state courts, this Court is constrained by 28 U.S.C. § 2254(d) which provides that:

> An application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

> established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

Under § 2254(d)(1), the writ may issue only if the state court adjudication resulted in a decision that was contrary to clearly established federal law, as determined by the Supreme Court of the United States, or the decision involved an unreasonable application of clearly established federal law. Considering new facts presented for the first time in this habeas proceeding would skew the determination to be made under AEDPA's standard of review because, logically, the state court could not have applied the law to facts that were not before it. Therefore, without considering the new evidence, the Court concludes that the state court's decision on this ineffective assistance of counsel claim was neither contrary to nor an unreasonable application of clearly established federal law as determined by the Supreme Court.

Insofar as Petitioner's claim is supported by "newly discovered evidence," it is unclear as to whether Petitioner is claiming the evidence should be considered under 28 U.S.C. § 2254(e)(2) which sets forth the conditions which must be met before a petitioner who has failed to develop the factual basis of a claim in state courts may obtain an evidentiary hearing on his claim. The Court must first determined whether the provision applies by

determining whether the petitioner or his counsel "failed to develop the facts because of a lack of diligence or some other fault attributable to a petitioner or his attorney." *Williams v. Taylor*, 529 U.S. 420 (2000). If the failure to develop the facts underlying the claim is not attributable to the petitioner, then he does not have to satisfy the statutory conditions in § 2254(e)(2) to obtain an evidentiary hearing.

In the case before this Court Petitioner has not carried his burden of proof to make the requisite showing to allow this Court to consider this new evidence. Petitioner has failed to demonstrate cause, unattributable to himself or his trial counsel, for failing to present these witnesses and this evidence in state court. In addition, Petitioner has not demonstrated that a fundamental miscarriage of justice will result from the Court failing to consider this evidence. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992) (cause and prejudice standard is correct standard for excusing habeas petitioner's failure to develop material fact in state court proceedings); 28 U.S.C. § 2254(e)(2).

Because 28 U.S.C. § 2254(d)(2) is an express limitation on the district court's jurisdiction, this Court is restricted to the extent that it may only consider the state court's determination of the facts in light of the evidence presented in the state court proceeding. Additionally, 28 U.S.C. § 2254(e)(2) is an express limitation on the Court in deciding whether to hold an evidentiary hearing. Consequently, Petitioner's failure to develop the facts of this new evidence in the state court proceedings and his

failure to demonstrate the failure was not attributable to him or his trial counsel prevents this Court from considering the new evidence to support this claim because the criteria which would allow this Court to consider the new evidence has not been satisfied. Therefore, the Court will only consider the evidence fairly presented to the state court when evaluating the state court's decision on this claim.

Petitioner's counsel claims:

> [t]he state court denied Mr. West relief with respect to his ineffective assistance of counsel claim, and citing *Lockhart v. Fretwell*, 506 U.S. 364, . . . (1993), concluded that Mr. West had not demonstrated how he was prejudiced by counsel's deficient performance. *West v. State*, 1998 Tenn.Crim.App. LEXIS 636, *24 (Tenn. Crim. App. 1998). The Tennessee Supreme Court's citation and application of the erroneous prejudice standard of *Lockhart v. Fretwell*, 506 U.S. 364 . . . (1993), mandates relief because this was contrary to or an unreasonable application of *Strickland. See West v. State*, 1998 Tenn. Crim. App. Lexis 636 p. *22 . . . ."

[Doc. 111, pp. 55-56]. This claim does not make sense and is not supported by the record.[24]

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[24] Petitioner's argument is disingenuous because, based upon this Court's review of the record, *Lockhart v. Fretwell* was never relied on by any state court that ruled on Petitioner's case. The

An ineffective assistance of counsel claim is a mixed question of law and fact. *Strickland*, 466 U.S. at 698. Because the state post-conviction court correctly stated the *Strickland* standard [Addendum No. 23, p. 274] and the appellate court affirmed the decision, under 28 U.S.C. § 2254(d), this Court cannot grant relief on this ground unless the state court based its decision to deny this claim on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding or the state court's adjudication of the claim was contrary to *Strickland*.

Looking at Petitioner's claim that trial counsel was ineffective for failing to investigate mitigating evidence, the record reflects the state post-conviction trial court correctly cited *Strickland* and its standard when analyzing this claim [Addendum No. 23, p. 274]. The state post-conviction trial court heard alleged mitigating evidence from several witnesses during Petitioner's state post-conviction hearing.

Dr. Engum, a member of the Board of the Federal Defender, was Petitioner's expert during his state post-conviction hearing. Dr. Engum had previously testified in approximately twenty post-conviction proceedings on behalf of defendants

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Tennessee Supreme Court never addressed ineffective assistance of counsel, much less even mentioned *Lockhart v. Fretwell* in its decision in *State v. West*, 19 S.W.3d 753 (Tenn. 2000). The Court is aware that the Court of Criminal Appeals of Tennessee noted that the state cited *Lockhart v. Fretwell*, but the Court finds nothing that indicates the appellate court relied on that case in reaching its decision.

[Addendum No. 25, pp. 120-21]. Dr. Engum testified Petitioner's I.Q. and memory were in normal limits [Addendum No. 25, p. 90]. However, according to Dr. Engum, Petitioner had suffered a fairly significant depression which appeared to be of long-standing nature, and Petitioner had a severe mixed personality disorder [Addendum No. 25, p. 92]. Dr. Engum further noted that although Petitioner was suffering a depressive disorder, it was not otherwise specified because, although there were a number of elements of depression, they were not of sufficient quantity or severity to warrant a diagnosis of major depression [Addendum 25, p. 105]. In addition, Dr. Engum explained that although he never made the definitive conclusion that Petitioner had been abused, the test results indicated Petitioner had been abused [Addendum No. 25, p. 134]. However, Dr. Engum testified the Petitioner's neuropsychological evaluation showed no signs of organic brain damage or brain trauma which contradicted the testimony of family members that Petitioner had been abused as a child.

Dr. Bursten, the psychiatrist who initially evaluated Petitioner prior to his jury trial, did not agree with Dr. Engum's conclusion that the test results indicated Petitioner had been abused, nor did Dr. Bursten agree that the effect of the alleged abuse caused extreme emotional disturbance. The state post-conviction court determined the testimony presented regarding mitigation evidence, that trial counsel failed to present to the jury, was conflicting. Consequently, the state post-conviction court determined Petitioner failed to meet his burden of

proof and failed to demonstrate how he was prejudiced by any of counsel's acts or omissions [Addendum No. 23, p. 278]. The record supports these findings.

The Court observes that although there are allegations that Petitioner was abused as a child, there is no substantially reliable evidence to support this allegation. First, the fact that the claim of abuse was not raised until after Petitioner received the death sentence is suspect. Second, Petitioner has not made a credible showing that he actually suffered any abuse. Petitioner's strongest proof of abuse is testimony by his oldest sister, Debra West. However, her testimony of alleged abuse of Petitioner substantially contradicts the testimony she presented during the sentencing hearing.[25]

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[25] At the sentencing hearing his sister characterized Petitioner's relationship with the family in a positive way saying he was the baby of the family and she was four years older than him; he was just a little brother, never in trouble or anything, "just a little pest, never anything bad." [Addendum No. 13, p. 101]. She testified Petitioner never had any problems with other family members and he was not a discipline problem. Petitioner's sister testified she "wasn't really that close to Steve because [she] was so much older, but, [she] knows he got good grades" in school and he was never in any trouble in school. [Addendum No. 13, p. 102]. She also testified he lived with her and her husband for a period of time while he was in high school and after he was discharged from the Army at which time there were never any problems. She testified she had no knowledge of Petitioner ever being in trouble and no knowledge of his ever committing violent acts [Addendum No. 13, p. 102].

However, during the state post-conviction proceedings, Petitioner's sister testified she was close to Petitioner and that

Furthermore, the Court's attention has not been directed to any medical records to substantiate Petitioner's allegations of physical abuse or medical records to support his allegation that the abuse resulted in several surgeries. Moreover, Petitioner himself has no recollection of any abuse, and his expert, Dr. Engum, specifically testified that he has "never made the definitive conclusion that Mr. West was abused." Dr. Engum further stated, " I do say the test results reflect that, but the testing cannot tell you about a specific event or events in somebody's earlier life"[26] [Addendum 25, pp. 134]. Accordingly, this Court agrees with the state post-conviction court's determination that conflicting testimony was presented regarding the mitigation evidence Petitioner claims trial counsel failed to present. Although family members have now come forward and alleged Petitioner was abused, this Court still has not seen any documentation to support these allegations. Petitioner's own expert testified the alleged abuse is something that needs to be corroborated by other sources other than Petitioner saying what he was told about the abuse. While some of Petitioner's relatives testified during the state post-conviction hearing, there was no

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when he lived with her, he did have a problem with drugs and alcohol [Addendum No. 25, pp. 172-72]. Her testimony regarding the abuse is specified in the post-conviction facts at Section I.C *supra*.

[26] Dr. Engum explained that the tests can reflect whether a person's personality characteristics or behavioral or emotional characteristics may be consistent with or reflect prior abuse [Addendum No. 25, p. 100-01].

documentation or independent sources to verify the alleged abuse. As previously explained, Petitioner's sister testified at the sentencing hearing but failed to mention any alleged abuse until she testified during the state post-conviction hearing. Petitioner's aunt, Ruby West, testified during the state post-conviction hearing about the alleged abuse. Ruby West testified Petitioner was about three years old when his mother grabbed him by the feet and threw him against the wall. Ruby West took him to the hospital because his nose and mouth were bleeding. No medical records were introduced to substantiate that claim [Addendum No. 26, pp. 382-383]. The state trial court determined Petitioner failed to meet his burden with respect to his claim of ineffective assistance of counsel at the sentencing phase [Addendum No. 23, pp. 277].

Petitioner also asserts trial counsel did not argue most of the mitigating facts he was relying upon, *i.e.*, showing Petitioner was a veteran and it would be a hardship on his family to be without him; he had no prior record; he was honorably discharged from the Army; he did not go armed to the victim's house; and he was a good prisoner. Although trial counsel's argument is not evidence, and the record does reveal trial counsel introduced testimony of the above referenced mitigating factors during Petitioner's trial [Addendum No. 13, pp. 93-121], this Court does believe the better practice would have been for trial counsel to argue the mitigating factors to the jury. However, the simple fact that trial counsel did not argue each mitigating factor he introduced into

evidence does not demonstrate ineffective assistance of counsel.[27]

It appears the state post conviction court and the appellate court decision that counsel was not ineffective for failing to investigate and present mitigating evidence during the sentencing hearing was based on a reasonable determination of the facts in light of the evidence presented in the state court proceeding, and that the decision was not contrary to *Strickland*. The decision reached by those courts does not reflect an unreasonable determination of the facts in light of the evidence presented in those state court proceedings nor is the decision contrary to *Strickland*. Accordingly, Petitioner is not entitled to relief on his claim that counsel was ineffective for failing to investigate and present mitigating evidence during the sentencing hearing, and this claim will be **DISMISSED**.

4. Failure to Request Lesser Included Offense Instruction Constitutes Ineffective Assistance of Counsel (Amd. Pet. ¶ III.D.2)

In claim III.D.2, Petitioner claims counsel was ineffective for failing to request the lesser included

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[27] Although failure to investigate or present mitigating evidence at sentencing may establish ineffective assistance of counsel, *Wickline v. Mitchell*, 319 F.3d 813, 819 (6th Cir. 2003); Austin v. Bell, 126 F.3d 843, 848-49 (6th Cir. 1997), *cert. denied*, 523 U.S. 1088 (1998), Petitioner does not cite, and the Court's research does not reveal, any case that holds counsel is constitutionally ineffective for failing to argue the mitigating factors he introduced into evidence.

offense instruction for second degree murder. Counsel for Petitioner directs the district court's attention to the post-conviction transcript, and, in response to the State's contention that the claim was procedurally defaulted, to pages 10 and 13 of the state post conviction appellate brief, without any indication of where the appellate brief is located in the record.[28] However, pages 10 and 13 of the state post-conviction appellate brief, to which Petitioner's counsel refers the Court, is simply a statement of the facts. Petitioner's counsel then contends that the fact the state court did not address this issue is of no consequence to the question of exhaustion.

Petitioner specifically raised this issue in his state post-conviction appellate brief, *i.e.*, "Trial Counsel's Waiver of a Lesser Included Offense Charge to First Degree Murder Constituted Ineffective Assistance Counsel" [Addendum 28, p. 35]. Although the appellate court addressed the lesser included offense claim as it related to an allegation that the trial court was required by law to instruct the jury on the lesser included offenses of first degree murder, it did not do so in the context of ineffective assistance counsel. The appellate court determined that Petitioner failed to rebut the presumption of waiver of this issue. The only

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[28] Petitioner's counsel is reminded that counsel is to direct the Court to an addendum and page number to demonstrate that an issue was exhausted. Counsel should identify the record with the addendum number, page number, and any other identifying information so that the Court does not waste judicial resources hunting through volumes of record to determine to what Petitioner is referring.

statement that remotely resembles a comment about the ineffective assistance of counsel is where the appellate court stated that "[b]ased upon this overall record and the petitioner's theory of defense at trial, we also are of the opinion that, substantively, the issue is without merit" [Addendum 31, p. 22].

On appeal the State argued counsel's decision to forgo instruction on lesser included offenses was a strategic decision and did not constitute ineffective assistance of counsel. The trial record revealed counsel informed the state trial court that Petitioner did not wish the court to consider any lesser included offenses in his charge. In addition, the State argued that Petitioner failed to examine his attorneys concerning their decision to forgo the lesser included offense instruction.

Petitioner raised this claim in the appellate court and in his application for permission to appeal to the Tennessee Supreme Court [Addendum No. 34, p. 41]. The Tennessee Supreme Court granted the application only on the issue of whether the evidence at trial was sufficient to establish the aggravating circumstance that the murders were committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant of another [Addendum No. 36]. Therefore, This claim has been exhausted, and the Court will address it.

During the charge conference, the state trial court inquired about the justification for charging the jury on any offense other than the major offenses

charged in the indictment. Defense counsel, Mr. McConnell, responded:

> Yes, Your Honor. We have conferred, Mr. Alexander and I have conferred with our client and it is the defendant's position, which we ratify, that he wants to go to the jury only on the seven (7) counts of the indictment and he does not wish the Court to consider any lesser included offenses.

[Addendum No. 12, p. 79].

In a capital case, due process requires that a jury be given the option of convicting a defendant on a lesser included noncapital offense if the evidence would support conviction on that offense. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). In *Beck* the Supreme Court sought to avoid giving the jury a "death or nothing" option between conviction of a capital crime and finding the defendant not guilty. The Court explained that such a choice was unacceptable because "the unavailability of the third option of conviction on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished." *Id.* at 642.

A trial court must instruct the jury on a noncapital offense as defined by state law only if the evidence would have supported such a verdict. *Id.* at 627. "Only if the failure to instruct on lesser included offenses results in a miscarriage of justice or a fundamental defect in due process, will this type of

error merit habeas relief." *Samu v. ELO*, 14 F.3d Appx. 477 (6th Cir. July 9, 2001) (unpublished table decision), *available* in 2001 WL 814929 at *1, citing *Baggy v. Sowders*, 894 F.2d 792, 796-97 (6th Cir. 1990) (en banc).

In *Hopkins v. Reeves*, 524 U.S. 88 (1998), the United States Supreme Court explained that "[i]n *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), we held unconstitutional a state statute that prohibited lesser included offense instructions in capital cases, when lesser included offenses to the charged crime existed under state law and such instructions were generally given in noncapital cases." *Id.* at 90-91.

The Supreme Court has not precluded defendants from choosing to waive lesser included offense instructions. *See Spaziano v. Florida*, 468 U.S. 447, 456-57 (1984). The *Spaziano* Court stated:

> Although the Beck rule rests on the premise that a lesser included offense instruction in a capital case is of benefit to the defendant, there may well be cases in which the defendant will be confident enough that the State has not proved capital murder that he will want to take his chances with the jury. If so, we see little reason to require him not only to waive his statute of limitations defense, but also to give the State what he perceives as an advantage--an opportunity to convict him of a lesser offense if it fails to persuade the jury that

> he is guilty of capital murder. In this case, petitioner was given a choice whether to waive the statute of limitations on the lesser offenses included in capital murder. He knowingly chose not to do so. Under those circumstances, it was not error for the trial judge to refuse to instruct the jury on the lesser included offenses.

Id. at 456-457. It appears the Supreme Court has also determined that a defendant's right to a second degree instruction is waivable. *Spaziano v. Florida*, 468 U.S. 447 (1984). Everything in the record indicates Petitioner chose to knowingly waive his right to a second degree murder instruction.

Petitioner has not submitted a single case to demonstrate a defendant cannot waive a lesser included offense instruction. Therefore, Petitioner's right to a second degree murder instruction was waivable, and Petitioner knowingly chose to waive it. *See Cooper v. Caldern*, 255 F.3d 1104, 1111 n.6 (9th Cir. 2001). Accordingly, Petitioner's knowing waiver of the second degree murder instruction renders his *Beck* claim meritless

At the time this crime was committed, first degree murder was defined as:

> Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson,

> rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing placing or discharging of a destructive device or bomb, is murder in the first degree.

TENN. CODE ANN. § 39-2-202.

Second degree murder was defined as all other kinds of murder. TENN. CODE ANN. § 39-2-211. The punishment for second degree murder was imprisonment in the penitentiary for life or for a period of not less than ten (10) years. TENN. CODE ANN. § 39-2-212.

Petitioner relies on the testimony of his state post-conviction hearing witnesses, attorneys Summers and Morrow, to argue that there was evidence to support a second degree murder instruction. Mr. Summers testified there were some red flags that should have alerted trial counsel to conduct a further investigation into Petitioner's background. For example, trial counsel should have investigated the allegation that Martin, Petitioner's co-defendant, was involved in a satanic cult. In addition, Petitioner's military records indicated alcohol and drug abuse. Mr. Summers testified in pertinent part as follows:

> I don't understand why when the ultimate decision may be death . . . there was a waiver of instruction on second degree murder. And once again, I wasn't there as far as trial strategy, but in this particular case there's a big difference in supposedly the involvement of Martin

> and West and I think that that would have been an area for which the Jury -- you could aim for second degree murder, ask the Jury to be instructed as to the punishment and try to go for that.

[Addendum No. 26, p. 336]. In a case where the defendant is claiming he was not present at the scene of the crime, Mr. Summers said it might be a viable trial decision to waive the second degree murder instruction. However, according to Mr. Summers, in a case where there is no question that a defendant was present and involved to a certain extent, and there was evidence that the other party was really the leader, second degree murder should not have waived, but should have been argued. According to Mr. Summers, in this case the only two options that could really have been argued were that it was first degree murder and Petitioner should receive life imprisonment, or it was second degree murder [Addendum No. 26, pp. 343-44]. Mr Morrow concurred in Mr. Summers's opinion that second degree murder should not have been waived in Petitioner's case [Addendum No. 26, pp. 415].

Since juries are presumed to follow their instructions,[29] and the jury found Petitioner guilty of two first degree premeditated murders, the jury found the killings were willful, deliberate, malicious, and premeditated. In finding that the murders were

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[29] *See Weeks v. Angelone*, 528 U.S. 225, 233 (2000), citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("[a] jury is presumed to follow its instruction").

first degree premeditated, the jury necessarily determined it was not any other kind of murder.

The trial court instructed the jury on first degree murder as follows:

> Any person who willfully, deliberately, maliciously and with premeditation kills another person is guilty of murder in the first degree. For you to find the defendant guilty of murder in the first degree, the State must have proven, beyond a reasonable doubt, that the defendant unlawfully killed the alleged victim, that the killing was malicious, that is, that the defendant was of the state of mind to do the alleged wrongful act, without legal justification or excuse.
>
> A case of homicide cannot be murder in the first degree unless at and before the killing, the wicked intent constituting malice aforethought exists in the mind of the slayer. Malice is an intent to do any injury to another, a design formed in the mind of doing mischief to another.
>
> That the killing was willful, that is, that the defendant must have intended to take the life of the alleged victim. That the killing was deliberate, that is, with cool purpose, and that the killing was premeditated.
>
> This means that the intent to kill must have been formed prior to the act itself.

> Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill pre-exists in the mind of the accused for any definite period of time. It is sufficient that it preceded the act however short the interval. The mental state of the accused at the time he allegedly instigated the act which resulted in the alleged death of the deceased, must be carefully considered in order to determine whether the accused was sufficiently free from passion as to be able - as to be capable of premeditation.
>
> Passion does not always reduce the crime below murder in the first degree since the person may deliberate, may premeditate and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time.
>
> If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a passion or excited and the design was carried into effect.

[Addendum No. 13, pp. 32-34]. The jury returned a verdict of guilty on two counts of first degree murder [Addendum No. 13, pp. 53-54]. The fact that the jury sentenced Petitioner to death indicates they did not find him less culpable or that they found him guilty

of first degree murder because they did not have a choice of a lesser included offense.

Petitioner has failed to demonstrate that there was any proof in the record to require the trial court to instruct the jury on second degree murder. Petitioner's defense was that he was not involved in the two murders in any way, and as to his involvement in the rape, Petitioner alleges he was forced at gunpoint to have sex with the victims and was prevented from helping them [Addendum No. 12, pp. 8-9]. Apparently Petitioner made the decision to waive the second degree murder instruction because he was relying upon the fact the State had nothing but circumstantial evidence to prove his involvement in the actual murders. In addition, Petitioner was also placing reliance on the fact that there was no testimony from anyone who was present during the commission of the crimes to contradict his testimony as to how the offenses occurred.[30] It appears Petitioner calculated that the jury would at least have reasonable doubt after he testified that he did not participate in the murders, since there was no one who testified to the contrary.[31] Thus, the strategic decision not to give

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[30] In his direct appeal raising the issue of prosecutorial misconduct, Petitioner claimed there was absolutely no evidence connecting him with the murders and no evidence to contradict his testimony as to how the offenses occurred.

[31] The Court observes that during Petitioner's state post-conviction hearing witnesses referred to Petitioner's more limited role in these crimes. However, Petitioner has been adamant that he was forced at gunpoint to engage in sex acts with the victims. In addition, he hss adamantly denied any

the jury an opportunity to convict him of any other type of murder may be characterized as sound.

Petitioner did not testify during his state post-conviction petition that he did not knowingly waive the second degree murder instruction or provide any proof to indicate his waiver was unconstitutional. At this juncture, not only has Petitioner not demonstrated that his waiver was unknowingly, Petitioner has not demonstrated that the lesser included offense of second degree murder jury instructed was supported by the evidence.

However, assuming for the sake of discussion that Petitioner did not knowingly waive the instruction and that the Petitioner's testimony that Martin was solely responsible for the murders justified the second degree murder jury instruction, Petitioner still would not be entitled to habeas relief because he cannot prove prejudice. Petitioner must "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. "This requires showing more than the possibility that he was prejudiced by counsel's errors; he must demonstrate that the errors *actually* prejudiced him." *Cooper v. Calderon*, 255 F.3d 1104, 1109 (9th Cir. 2001), *cert. denied*, 537 U.S. 861 (2002), citing *Strickland*, 466 U.S. at 695. "Only if the failure to instruct on lesser included offenses results in a miscarriage of justice or a fundamental defect in due process, will this type of error merit habeas relief." *Samu v. ELO*, 14 F.3d [sic.] Appx. 477 (6th Cir. July 9, 2001) (unpublished table decision),

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involvement in the murders and has never acknowledged any role in the murders.

available in 2001 WL 814929 at *1, citing *Bagby v. Sowders*, 894 F.2d 792, 796-97 (6th Cir. 1990) (en banc). Petitioner has not demonstrated that the waiver of the second degree murder instruction resulted in a miscarriage of justice or a fundamental defect in due process. Consequently, he has failed to meet the second prong of the *Strickland* test, *i.e.*, Petitioner has failed to demonstrate prejudice resulted from the waiver of this instruction.

It is possible that a jury could have convicted Petitioner of second degree murder had the offense been included in the jury's instructions if the jury believed Petitioner had a more limited role than Martin and was forced at gunpoint to participate. However, the fact that the jury sentenced Petitioner to death means the jury did not believe his version; the jury did not find Petitioner had a more limited role nor did the jury find Petitioner was forced at gunpoint to participate. To find otherwise, this Court would have to assume that the jury, unconvinced that Petitioner was guilty of two first degree murders, but adamant about not acquitting him completely on the murders, chose verdicts of first degree murder and then sentenced him to death as a means of punishment. There is no evidence in the record to support such irrationality, and thus the Court cannot find that the verdicts are unreliable. Therefore, even if the jury should have been instructed on second degree murder, the verdicts and sentence demonstrate the jury would not have found Petitioner guilty of the lesser noncapital offense of second degree murder. Consequently, Petitioner has not demonstrated that there is a reasonable

probability sufficient to undermine confidence in the outcome that, but for counsel's alleged unprofessional error of waiving the second degree jury instruction, the result of the trial proceeding would have been different. Thus, Petitioner cannot demonstrate he was prejudiced by waiving the jury instruction for second degree murder.

Petitioner cites *Beck v. Alabama*, 447 U.S. 625 (1980), to support his claim that counsel was ineffective for waiving the second degree murder jury instruction. However, unlike the situation in *Beck*,[32] the jury was not required to choose between convicting Petitioner for a capital offense or setting him free. Petitioner was indicted on seven counts, so the jury could have found him not guilty of the capital offense but guilty of the other serious offenses. Thus, the all-or-nothing nature of the decision with which the *Beck* jury was presented is not present in Petitioner's case.

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[32] In *Beck v. Alabama*, the defendant was charged with the capital crime of intentionally killing a robbery victim. The defendant admitted the robbery but denied he killed or intended to kill the victim. Alabama law prohibited the judge from instructing the jury on any lesser included offense, so the judge did not instruct on the noncapital offense of felony murder. Therefore, the jury was given the choice of convicting the defendant of intentionally killing a robbery victim, in which case it was required to impose the death penalty, or acquitting him which would have allowed the defendant to escape all punishment for his alleged participation in the crime. The Supreme Court found this scheme to be unconstitutional because the unavailability of a lesser included offense instruction increases the risk of an unwarranted conviction.

In *Schad v. Arizona*, 501 U.S. 624 (1991) ([t]he jury was charged on premeditated and felony-murder and second degree murder but not on Schad's requested robbery instruction), the defendant argued that *Beck* required that the jury in a capital case be instructed on every lesser included noncapital offense supported by the evidence, and that robbery was such an offense in this case. The Supreme Court explained that the defendant "misapprehend[ed] the conceptual underpinnings of *Beck*. Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." *Schad v. Arizona*, 501 U.S. at 646. The *Schad* Court explained that the goal of *Beck* was to "'eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.'" *Id.* at 646-47, *quoting Spaziano v Florida*, 468 U.S. 447, 455 (1984). The Court then determined the central concern of *Beck* was not implicated in *Schad* because the jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence. *Schad* at 647. In *Schad* the trial court instructed the jury on first degree premeditated murder and first degree felony murder. The court denied the request by defense counsel to instruct on theft, but the court did instruct on second degree murder.

In the case before this Court, Petitioner was tried on seven counts. If the jury believed his theory of the

case, *i.e.*, that he himself was a victim and was forced to have sex with the victims and was entirely innocent of murder, rape, and the other crimes, then the jury could have found him not guilty on all charges. However, if the jury believed he was involved in the rapes and other crimes, but was not involved in murdering the victims, the jury could have convicted him on all counts other than the murders. Moreover, if the jury had been inclined to return a verdict of second degree murder at the guilt phase because it was not convinced that Petitioner was guilty of first degree murder, the jury presumably would not have sentenced him to death.

This Court observes that the jury found the murders involved torture in addition to the aggravating factor that they were committed during the perpetration of a felony. Consequently, it appears that the jury did not accept Petitioner's defense that he was a victim and, further, the only victim who was allowed to live. The jury obviously determined the murders were committed by two people and since Petitioner did nothing to prevent them and failed to report the crime at the first opportunity, that his version of the facts was not credible. Therefore, the Court cannot find that the waiver of the second degree murder instruction increased the risk of an unwarranted conviction for the capital offense. In addition, Petitioner has not directed the Court, nor is the Court able to find, any testimony in the post-conviction transcripts regarding trial counsel and Petitioner's decision to waive the second degree murder instruction.

The burden is on Petitioner to prove his claims in habeas proceedings. This he has not done. The record indicates Petitioner did not want the jury instructed on any lesser included offenses [Addendum No. 12, p. 79]. Consequently, not only has Petitioner failed to prove counsel was ineffective, Petitioner has failed to prove the waiver of the second degree murder instruction was not knowingly, or that the waiver prejudiced him. Therefore, he is not entitled to any habeas relief on this claim. The State's motion for summary judgment [Court File No. 125] will be **GRANTED**, and Petitioner's claim that counsel was ineffective for waiving the second degree murder jury instruction will be **DENIED**.

5. Prosecutor's Misconduct Denied Petitioner His Due Process Rights and a Fair Trial (¶ V. A-C, & E)

Petitioner claims he is entitled to habeas relief because the prosecutor engaged in improper conduct. In claims A-F of paragraph V., Petitioner identifies numerous instances where the prosecutor made arguments that he contends are improper.

Respondent contends Petitioner's prosecutorial misconduct claim was not raised on direct appeal as a deprivation of a federal constitutional right. Thus, argues Respondent, Petitioner's brief to the Tennessee Supreme Court on direct appeal failed to give the Court "adequate notice" that it was to decide a federal constitutional issue. Respondent asserts that Petitioner only argued state law in support of his claim; he did not claim a federal constitutional violation, nor did he cite to any federal case law.

Respondent is correct in that Petitioner did not specifically identify a constitutional violation nor cite federal case law. However, there are other ways Petitioner could have fairly presented his constitutional claim to the state courts without citing chapter and verse of the United States Constitution. *See Duncan v.* Henry, 513 U.S. 364 (1995); Daye *v. Attorney General of State of New York*, 696 F.2d 186, 194 (2nd Cir. 1982), *after remand*, 712 F.2d 1566 (2nd Cir. 1983), *cert. denied*, 464 U.S. 1048 (1984). Petitioner could have relied on federal cases employing constitutional analysis, which he did not do. Or, Petitioner could have relied on state cases that constitutionally analyzed similar fact situations. In addition, he could have asserted the claim in terms that necessarily raised the specific constitutional right or alleged a pattern of facts that is well within the mainstream of constitutional litigation. *Id.*

Petitioner did not specifically apprise the state courts of the constitutional theory or federal case law to be relied upon at appellate review. The legal theory presented to the state courts was that the prosecutor engaged in misconduct, and only state law was cited in support of this claim. On its face, it appears that Petitioner failed to specifically present this claim as a federal constitutional claim to the state courts, *see* 28 U.S.C. § 2254(b), because he did not squarely present a constitutional claim or cite federal cases. *See Duncan v. Henry*, 513 U.S. 364 (1995). It appears that Petitioner presented this habeas claim in state court as a similar claim, citing state law, *i.e.*, improper conduct of the prosecutor

based on state law, rather than as a constitutional claim that the alleged improper conduct violated his due process rights which ultimately resulted in a denial of a fair trial. *See Picard v. Connor*, 404 U.S. 270, 275, 276 (1971).

However, upon review of his brief and the cases Petitioner cited, along with the cases relied upon by these cited cases, Petitioner did raise the claim in terms of claiming that prosecutorial misconduct affected the verdicts to his prejudice and that it amounted to reversible error [Addendum No. 16, pp. 13-40], which arguably is another way of saying prosecutorial conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The five factors Petitioner identified to be considered in determining whether the prosecutorial misconduct affected the verdicts according to Tennessee law are similar to the factors used when determining whether a constitutional violation occurred. Some of the cases cited by Petitioner arguably analyze the issues based on federal law. The five factors used by Petitioner to determine if prosecutorial misconduct affected his verdicts were:

1. The conduct complained of viewed in context and in light of the facts and circumstances of the case;
2. The curative measures undertaken by the Court and the prosecution;
3. The intent of the prosecution in making the improper statement;

4. The cumulative effect of the improper conduct and any other errors in the record; and

5. The relative strength or weakness of the case.

[Addendum No. 16, pp. 13-14].

Prosecutorial misconduct must be so egregious as to deny a petitioner a fundamentally fair trial before habeas relief becomes available. *Darden*, 477 U.S. at 181; *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974). "[I]t 'is not enough that the prosecutor's remarks were undesirable or even universally condemned.'" *Darden*, 477 U.S. at 181 (citation omitted). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Donnelly*). The appropriate standard of review for such a claim on a writ of habeas corpus is the narrow one of due process. *Id.*

In determining when prosecutorial misconduct warrants a new trial, a two-step approach is utilized. First, the court must determine whether the prosecutor's conduct and remarks were improper. If the remarks were improper, the court then considers and weighs four factors to determine whether the conduct warrants habeas relief. *See United States v. Carter*, 236 F.3d 777, 783 (2001). The factors a court considers in determining whether prosecutorial misconduct resulted in a denial of due process are the following:

1. The degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused;
2. Whether they are isolated or extensive;
3. Whether they were deliberately or accidentally placed before the jury; and
4. The strength of the competent proof to establish the guilt of the accused.

Byrd v. Collins, 209 F.3d 486, 528-534 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001)

The factors this Court is to consider are very similar to the factors raised in Petitioner's brief on direct appeal. In addition, the Tennessee Supreme Court considered the similar factors listed in *State v. Buck*, 670 S.W.2d 600, 609 (Tenn. 1984), in reviewing the alleged misconduct claims presented in Petitioner's direct appeal. Therefore, the Court will address Petitioner's prosecutorial misconduct claim on the merits. However, as explained below, treating this claim as properly raised still does not entitle Petitioner to habeas relief because he has failed to demonstrate that the state court's decision on this claim was contrary to, or involved an unreasonable application of, clearly established federal law. Additionally, Petitioner has not demonstrated that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court.

a. Prosecutor Claimed Defense Counsel was Attempting to Deceive/Mislead the Jury (¶ V.A)

Petitioner claims the prosecutor engaged in improper argument by repeatedly arguing that defense counsel was attempting to deceive and mislead the jury. Petitioner identified eleven instances where the prosecutor made reference to defense counsel's argument as amounting to "throwing sand or blowing smoke" in the eyes of the jury and defense counsel's attempt to confuse the jury. Petitioner claims these statements amounted to the prosecutor(s) making repeated assertions that defense counsel were lying to the jury which violated Petitioner's right to due process and a fair trial.

The Tennessee Supreme Court determined that although it was improper for the prosecutor to make reference to the defense attorney "trying to throw sand in the eyes of the jury" and "blowing smoke in the face of the jury," that in view of the context in which the remarks were made and in light of the overwhelming evidence of Petitioner's guilt, the instances of prosecutorial misconduct were harmless beyond a reasonable doubt. *State v. West*, 767 S.W.2d 387, 395 (Tenn. 1987).

This Court has reviewed all eleven instances in which Petitioner claims the prosecutor stated defense counsel was attempting to mislead the jury. However, Petitioner refers the Court to page twelve of the transcript, lines six and seven, and the Court's copy does not include any reference to "trying to throw sand in the eyes of the jury" at that text

[Addendum No. 13, p. 12]. The prosecutor made several statements about defense counsel "throwing sand in the eyes of the jury" [Addendum No. 13, pp. 2, 5] which the Court has reviewed. First, the prosecutor told the jury that attorneys have told him that "[i]f neither the facts or law are on your side, if neither is on your side, then see if you can't confuse the jury, see if you can't divide the jury, or see if you can't throw a little sand in the eyes of the jury" [Addendum No. 13, p. 2]. Then the prosecutor argued that "when they say to you that he shouldn't be found guilty, just because he is a liar, that is an attempt to blow a little smoke in your eyes and say - oh, don't convict him just because he is a liar, as it doesn't make any difference that he is a liar" [Addendum No. 13, p. 5]. He also referred to throwing a little sand in their eyes when defense counsel talked about trace evidence [Addendum No. 13, p. 5]. The prosecutor also argued that "[a]nother attempt to throw a little sand in your eyes is to attempt to get your mind off the fact that Mr. West had to be a participant in this crime, is when they say - oh, we investigated - or we cooperated one hundred percent in this investigation" [Addendum No. 13, at 6].

The Court interprets the prosecutor's comments as saying defense counsel is trying to confuse the jury and confuse the issues, not that defense counsel was lying. The Tennessee Supreme Court ruled that it was improper for the prosecutor to make the above referenced remarks. However, the Tennessee Supreme Court also found that the remarks were harmless. This Court does not find that the

Tennessee Supreme Court's ruling is contrary to, or involved an unreasonable application of clearly established federal law. Additionally, Petitioner has not demonstrated that the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court.

Specifically, the state court determined that "viewed in the context in which the improper remarks occurred and in light of the overwhelming evidence of defendant's guilt the instances of prosecutorial misconduct were harmless beyond reasonable doubt." *State v. West*, 767 S.W.2d 387, 395 (1989). The Court has reviewed the comments and has determined that the remarks complained of did not have a tendency to mislead the jury and to prejudice the accused. Many of the prosecution arguments were countering the arguments of defense counsel. Out of approximately thirty pages of the prosecutor's final closing argument, Petitioner has identified eleven references made about defense counsel throwing sand into the eyes of the jury. The Court cannot find that those arguments were extensive. Although the Court cannot say the remarks were accidentally placed before the jury, the Court does find that the strength of the competent proof to establish the guilt of Petitioner was overwhelming, and the comments by the prosecutor did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Hence, Petitioner has failed to establish he was deprived of due process.

The Court finds that the state court's determination that the alleged improper statements by the prosecutor regarding defense counsel deceiving/misleading the jury were harmless error, was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent, and was not an unreasonable determination of the facts. Respondent's motion for summary judgment will therefore be **GRANTED** [Court File No. 124, 126]. Petitioner's claim that the prosecutor denied him of his due process rights when he argued defense counsel was attempting to deceive/mislead the jury will be **DISMISSED** [Court File No. 111].

b. Prosecutor's Arguments that Petitioner was a Liar (¶ V.B)

Petitioner claims the prosecutor repeatedly argued that he was a liar, that he had lied to authorities, and had lied in his testimony at trial. Petitioner alleges four specific instances where the prosecutor made arguments that Petitioner was lying. Petitioner contends the prosecutor's attacks were not expressly based on evidence before the jury, so consequently, argues Petitioner, the prosecutor's conduct was improper. Petitioner claims the jury could have reasonably believed that the prosecutor was expressing his personal opinion about Petitioner's credibility and character, which is a violation of his due process rights.

When a defendant testifies, as Petitioner did, a prosecutor may attack his credibility to the same extent as any other witness. *See Raffel v. United*

States, 271 U.S. 494, 497 (1926). The Court is unaware of any constitutional violation when a prosecutor asserts a defendant is lying during closing argument when emphasizing discrepancies between the evidence and the defendant's testimony. *See United States v. Veal*, 23 F.3d 985, 989 (6th Cir. 1994). To avoid misconduct the comments must "'reflect reasonable inferences from the evidence adduced at trial.'" *United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999) citing *United States v. Veal*, 223 F.3d 985, 989 (6th Cir. 1994) (quoting *United States v. Goodapple*, 958 F.2d 1402, 1409-10 (7th Cir. 1992).

During closing argument the prosecutor was emphasizing discrepancies between the evidence in Petitioner's testimony and the testimony of Agent Scott when he argued Petitioner was a "gifted liar" [Addendum No. 13, p. 21]. The prosecutor had stated that Agent Scott testified he took the last statement after advising Petitioner of his rights, had Petitioner read the rights himself, and informed Petitioner that if he was willing to talk to Agent Scott to sign the waiver, which Petitioner signed. Then the prosecutor stated, "Mr. West has the audacity to say that Agent Scott even lied about that. That he never advised him of his rights, never had him sign the waiver, and that he didn't sign it in front of him" [Addendum No. 13, p. 20]. The prosecutor went onto state that West said, "oh, my signature got on that page because the day before Bill Breeding, a Union County deputy, tipped up the paper after I signed the consent to search, and had me sign the second page" [Addendum No. 13, p. 20]. The prosecutor then said

"[n]ow, you are a gifted liar, Mr. West. You are not just a liar-," and the defendant stated "You are not much different." Defense counsel stated, "Your Honor, I would ask that the court - of course, with-" to which the Court responded, "Mr. McConnell, it is the responsibility of the Court to admonish the crowd if it thinks it is necessary, and I will certainly do so without any urging from you. Ladies and gentlemen, be reminded that this is argument. Proceed" [Court File No. 13, pp. 20-21]. The evidence inferred that either Petitioner or the law enforcement officer was lying; thus, the prosecutor was allowed to argue his theory of the case. *See Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000).

The next alleged instance of prosecutorial misconduct refers to the argument made by the prosecutor about the discrepancy in testimony as to where the defendants parked the vehicle prior to committing this crime. The prosecutor explored and discussed the discrepancy of where the vehicle was parked as follows:

> Oh yeah, I don't want to forget this. Talking about after being stuck in the ditch, he says - that they parked the car near the main highway and walked up to the Romines' residence. He says that in more than one of these statements, . . . Well, let's explore that for a second. Now, you have got Mrs. Eddie Hicks, Majorie Majors, referring to Exhibit 1, who indicate to you that they have lived in this neighborhood for years, for years. And that at 7:30, and at 7:40, and at

8:30, the blue [sic] is down near the road, adjacent to this field. Folks, you can see how far that is from the Romines' residence. And in at least three, three of the statements he says that they parked the car near the main highway and walked up to the Romines' residence. Well folks, that is 61- that is the main highway. You would have to walk up to the Romines' residence, would you not? Yesterday -yesterday, he says - oh no, no, no - no, no, I didn't mean that. That car was never there. That car was never down there. I parked right up here in front of these vehicles, right next to the Romines' home. That is not what he said in his statement, that is not what Marjorie Majors, or Kathleen Hicks said. So, why is that important? ... That is important for this reason - Mr. West would have you believe that he was duped by Ronnie Martin - . . . that he had honorable intentions - honorable, when he went to the Romines' house, you know - there was nothing wrong with that. If in fact . . . the car was down here by the highway, which is what the neighbors say and what he said at first - would it not seem real suspicious that you would park all the way down there in a cover of darkness, and slip up all this way to the Romines' house? Now, why would you do that if your intentions are honorable, if

> you are going there for a legitimate purpose, why would you park way down here, and walk all that distance to the Romines' home? The answer is very, very simple. You would not. You would not, no way. You see, he is not stupid, Mr. West is no fool. He has had a year to study these statements, to look at pictures, charts, he heard all of the testimony.

[Court File No. 12, at 112-14]. Defense counsel objected at this point on the grounds that Petitioner did not have a year to look at the charts because the charts were prepared for the trial. The trial court sustained the objection. As to the prosecution's referral to Petitioner's access to statements, pictures, and all of the testimony, this Court does not find that it constitutes prosecutorial misconduct. Defense counsel claims the charts were prepared by the prosecution and that Petitioner did not see them until trial. However, as noted above, there were references to items that Petitioner would probably have had an opportunity to review prior to his trial. Accordingly, the Court finds no prosecutorial misconduct in this statement.

The prosecutor suggested to the jury that Petitioner "has practiced and practiced and practiced his version, the final version which he told you here which had details in it that have never been told to a law enforcement officer before" [Addendum No. 13, p. 29]. Considering all the different statements attributed to Petitioner in the record and comparing it to the statement he made on the stand, the Court

does not find that this comment amounted to prosecutorial misconduct.

Next, Petitioner challenges the prosecutor's characterization of his statement that he had consensual sex with the minor victim. The prosecutor argued that Petitioner first tried to assassinate the victim's character:

> After this man claims that he witnessed this terrible and brutal murder of Shelia and Wanda, after he has not reported it for twenty-four (24) hours, after he has been arrested, after the officers are interrogating him, can you believe that he had the audacity to say that Shelia Romines consented to have sex with him in the house with her mother right there? . . . That is the most ludicrous, cruel lie that has ever been told in Union County history. . . .

[Addendum No.13, p. 15]. The prosecutor also argued Petitioner put on an act while on the stand and that defense counsel's argument that Petitioner was looking down the barrel of a gun and was forced to participate in this criminal activity was "balderdash" because the proof demonstrated that Petitioner and his co-defendant, Martin, went to the house for sex [Addendum No. 13, p. 21]. The prosecutor argued that Petitioner came into the house for forced sex and then he and Martin eliminated the witnesses. The Court has also reviewed the other instances where the prosecutor argued Petitioner was a liar. The Court does not find any of the prosecutor's

arguments regarding Petitioner's inconsistent statements about the conditions under which he had sex, or the prosecutor's reference to Petitioner being a liar, to be misconduct. The arguments by the prosecutor that Petitioner was a liar contained no suggestion that the prosecutor was relying on information outside the evidence presented at trial. The prosecutor's arguments were either supported by the record, emphasized discrepancies between the evidence and defendant's testimony, or reflected a reasonable inference from the evidence presented at trial. *See United States v. Francis*, 170 F.3d at 551.

Although there were a few instances when the prosecutor's remarks were not supported by any direct evidence, the Tennessee Supreme Court found that the arguments were supported by the evidence when viewed together with the proof of the crime. Petitioner claims the prosecutor implied he was under the influence of drugs at the time of the offense but there was no evidence to support that claim. The Tennessee court found no error because,

> [T]he manager of the McDonald's where defendant worked testified that on 17 March, the day of the murders, defendant acted strange, told her he did not feel well and at one time acted like he "was having flashback from an acid trip." That evidence, together with the grossly inhuman brutality inflicted upon the victims, can be said to give rise to an inference that a substance more potent in deadening human consciousness than beer was used.

State v. West, 767 S.W.2d at 395. The state court proceeded to determine that in other instances the district attorney's remarks had borderline support and in a few instances there was no support nor proper inferences. However, the Tennessee Supreme Court determined that in light of the overwhelming evidence of the defendant's guilt, any instance of prosecutorial misconduct was harmless beyond a reasonable doubt.

Accordingly, the state court's determination that, viewed in the context in which any improper remarks occurred and in light of the overwhelming evidence of defendant's guilt, any prosecutorial misconduct was harmless beyond a reasonable doubt was reasonable under existing Supreme Court precedent and cannot be disturbed. *See* 28 U.S.C. § 2254(d). This claim of prosecutorial misconduct by Petitioner will be **DISMISSED**, and Respondent will be **GRANTED** summary judgment.

c. Improper Argument About the Romines Family (¶ V.C)

Petitioner claims the prosecutor's arguments about the Romines family inflamed the jury's passions. Petitioner asserts that the prosecutor claimed Mr. Romines was a necessary witness and if Petitioner had confessed he would have spared Mr. Romines from finding his wife and daughter dead.[33]

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[33] Petitioner directs the Court's attention to Addendum No. 11, p. 116, lines 9-17. The Court does not find that the prosecutor argued Mr. Romines was a necessary witness on page 116 of Addendum No. 11.

However, what actually transpired during the trial was the prosecutor was cross examining Petitioner and said, "[g]ood citizen Petitioner, working over at the McDonald's had he reported this, Mr. Romines wouldn't have had to find his daughter and wife, would he?" [Addendum No. 11, p. 116]. The Court does not find that this argument constitutes prosecutorial misconduct.

Petitioner next argues the prosecutor engaged in misconduct when he argued that Petitioner and his accomplice, "gave Wanda and Shelia the death penalty. He gave them the death penalty. Slowly, brutally, painfully, because they happened to be witnesses to his sexual desires" [Addendum No. 13, p. 27]. The prosecutor is entitled to argue his theory of the case. Petitioner has not demonstrated this argument was improper.

Petitioner also claims the prosecutor improperly argued that Petitioner went home and slept while the victims were lying in their home in pools of blood with stab wounds all over their mutilated bodies. [*See* Addendum No. 12, p. 96]. Once again, the Court finds the proof supported this argument; thus, the prosecutor's argument did not prejudice Petitioner. Lastly, Petitioner claims the prosecutor improperly argued Petitioner "stated that he enjoyed the sex even under this condition. He got an erection, he enjoyed the sex, he ejaculated and left his semen inside the fifteen year old girl and left the house. Would you enjoy it?" [Addendum No. 12, p. 112]. Again, these were facts in the record or were reasonable inferences based on the evidence before

the jury. The Court does not find the argument to be improper.

Finally, even assuming for the sake of discussion that these arguments were improper, Petitioner would not be granted habeas relief because the Court does not find the prosecutor's statements to be "so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process deprivation." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974).

The Tennessee Supreme Court did not find these statements to amount to prosecutorial misconduct. Petitioner has failed to demonstrate, and this Court does not find, that the state court's finding that the prosecutor's arguments regarding the Romines family were not improper involved an unreasonable determination of the facts in light of the evidence, or that the state court's decision was contrary to or involved an unreasonable application of federal law. Accordingly, this claim will be **DISMISSED**. Petitioner's claim that the prosecutor's arguments about the Romines family inflamed the jury is without merit, and Respondent will be **GRANTED** summary judgment on this issue.

d. Prosecutor Allegedly Made Arguments Not Supported by the Record or the Evidence (¶ V.E.)

Petitioner contends the prosecutor made approximately eight arguments that were not supported by the record or the evidence. Petitioner claims these eight arguments were not expressly based on evidence before the jury and thus resulted

in denial of a fair trial due to prosecutorial misconduct.

First, Petitioner attacks the prosecutor's argument that Petitioner could have summoned help from the neighbor across the road who had a telephone and was ready to help the victims. Ms. Marjorie Majors testified she was caring for her elderly mother, who lived across the street from the Romines home, at the time of this crime. Ms. Majors arrived at her mother's home at 7:40 a.m. on March 17, 1986, and remained there until later that afternoon. When she arrived she observed the vehicle belonging to Martin's mother parked nearby, and she later observed the vehicle depart from the area at approximately 8:30 a.m. After arriving home from work, Mr. Romines, who was visibly shaken, approached Ms. Majors and told her that his family had been murdered. Ms. Majors immediately called the authorities [Addendum No. 8, pp. 118-126]. The prosecutor's argument that Ms. Majors was across the street with a telephone ready to help the victims is supported by the reasonable inferences to be drawn from the Majors testimony. Accordingly, the argument was not improper,

Second, Petitioner claims the prosecutor argued the Union County Sheriff knew that two men had to be involved in the crime because of observations at the crime scene. What the prosecutor actually argued was as follows: "Sheriff Loy discovers that there had to be two men involved in this crime because of what he sees at the scene, and the men that Eddie Hicks saw and what he found out from Ruth Davidson, one man coming out of the woods and another man

picking him up . . ." [Addendum No. 13, p. 8]. This argument was supported by evidence introduced at trial and by the reasonable inferences to be drawn from that evidence; thus, this argument was not improper.

Petitioner's third claim is that the prosecutor improperly argued that Petitioner assisted in the disposal of the murder weapons or successfully washed blood off the murder weapons [Addendum No. 13, p. 11]. Petitioner testified Martin handed him a pair of gloves and told Petitioner to put some guns away [Addendum No. 11, pp. 94-96]. In one of Petitioner's statements he said Martin had him put on a pair of cotton type blood stained gloves and wipe all the guns clean [Addendum No. 10, p. 140]. Thus, the prosecutor's argument that Petitioner disposed of the murder weapons or cleaned the murder weapons is based on reasonable inferences to be drawn from the evidence.

Next, Petitioner claims the prosecutor's characterization of Petitioner's statement that he had consensual sex with the victim as "the most ludicrous, cruel lie that has ever been told in Union County" was misconduct [Addendum No. 13, p. 15]. Based on the fact that Petitioner initially claimed he had consensual sex with the young victim while her mother was present in the residence, the Court finds the prosecutor's argument was based on reasonable inferences to be drawn from the evidence.

Petitioner's fifth objection is that the prosecutor stated that, "[a]fter the butchery, [West and Martin] go in and clean themselves up before they leave."

[Addendum No. 12, p. 105]. Petitioner claims that not only was this fact never in evidence, but the argument was made for the sole purpose of prejudicing the jury. The Court notes there was testimony about the presence of blood stains on a pillow case [Addendum No. 10, p. 54], and human blood was found on towels which were found in the bathroom at the Romines home [Addendum No. 10, p. 45]. There was also testimony that semen was found on two towels located in Mrs. Romines's bedroom [Addendum No. 10, p. 47]. Consequently, the Court cannot find that the prosecutor's argument was improper because it is reasonable to draw the inference from the evidence that after the killings, the defendants cleaned themselves prior to leaving the Romines residence.

Petitioner complains that the prosecutor improperly argued the State had "gory" pictures that could have been shown [Addendum No. 13, p. 10]. Based on testimony about the murders, the jury could reasonably draw the inference that during the investigation pictures of the victims were taken at the scene. Accordingly, the Court finds this claim is not well taken.

In his seventh argument, Petitioner complains that the prosecutor improperly suggested that Petitioner was involved in Martin's decision to obtain a knife because there was no evidence indicating Petitioner was a party to that plan [Addendum No. 11, pp. 126-127]. Petitioner's driving around with the co-defendant discussing going to this house for the purpose of having sex, raping at least one victim, giving several inconsistent statements, failing to

report the crimes, and doing nothing to stop the crimes provides sufficient evidence to allow the jury to reasonably infer that Petitioner was involved in the plan to commit these crimes at knife point. The Court finds this claim is without merit.

Finally, Petitioner claims there was no physical evidence or testimony to support the prosecutor's argument that one person stifled Mrs. Romines's screams while the other stabbed her [Addendum No. 14, p. 6]. The evidence revealed that a pair of brown corduroy pants were found against Mrs. Romines's face. In addition, string was attached to both wrists, and she had been stabbed [Addendum No. 9, pp. 30, 39, 121-122]. Therefore, the prosecutor's argument was supported by reasonable inferences that could be drawn from the evidence introduced at trial. Hence, this claim does not entitle Petitioner to habeas relief.

The prosecutor's arguments were either supported by the record or evidence, or the arguments were supported by reasonable inferences to be drawn from the evidence introduced at trial. Even assuming for the sake of argument that the prosecutor's statements were improper, Petitioner would not be granted habeas relief because the Court does not find the prosecutor's statements to be "so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process deprivation." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974).

To the extent Petitioner raised these claims in state court, the Tennessee Supreme Court did not find these statements to amount to prejudicial error.

Petitioner has failed to demonstrate, and the Court does not find, that the state court's finding that the prosecutor's arguments did not result in prejudicial error involved an unreasonable determination of the facts in light of the evidence, or that the state court's decision was contrary to or involved an unreasonable application of federal law. Accordingly, Petitioner's claim that the prosecutor made arguments not supported by the record or the evidence will be **DISMISSED**, and Respondent will be **GRANTED** summary judgment on this issue.

6. Denial of Impartial Jury (Amd. Pet. ¶ VII.A)

Petitioner contends that his Sixth, Eighth, and Fourteenth Amendment rights were violated because he was denied a fair trial by an impartial jury. Petitioner contends the jury was adversely influenced by media coverage, and that in addition to the adverse media coverage, numerous other jury-related errors deprived him of his fundamental right to a fair trial and sentencing. Specifically, Petitioner claims the trial court's decision to refuse to grant him a change of venue was erroneous because the jury was exposed to the overwhelming media coverage which suggested he was guilty.

Respondent contends Petitioner is not entitled to relief on his claim that the trial court erred when it denied his motion for change of venue because the Tennessee Supreme Court's decision was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; nor was it a decision

based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

"The Sixth Amendment in terms guarantees 'trial, by an impartial jury . . .' in federal criminal prosecutions. Because 'trial by jury in criminal cases is fundamental to the American scheme of justice,' the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491 (1968). 'In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955)." *Nebraska Press Ass 'n v. Stuart*, 427 U.S. 539, 551, (U.S.1976).

Although the constitutional standard of fairness requires a panel of impartial and indifferent jurors for each defendant, qualified jurors do not have to be totally ignorant of the facts and issues involved in the case. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a

> verdict based on the evidence presented in court.

Id. at 723. At the same time, the juror's assurances that the juror is capable of putting aside individual impressions or opinions cannot be dispositive of the accused's rights to an impartial jury. The accused then has the opportunity to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Id.* at 723.

Adverse publicity can endanger the ability of a defendant to receive a fair trial. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979) (citations omitted). However, pervasive and adverse pretrial publicity does not inevitably lead to an unfair trial. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). "[E]xtensive knowledge in the community of either the crimes or putative criminal is not sufficient by itself to render a trial constitutionally unfair." *Dobbert v. Florida*, 432 U.S. 282, 303 (1977). A habeas petitioner claiming he was denied his constitutional right to a fair trial because of pretrial publicity must do more than simply show that the community was made well aware of the charges against him before a court will presume unfairness of constitutional magnitude at his trial; he must show the atmosphere at his trial was utterly corrupted by press coverage. *See Id.* at 303; *Murphy v Florida*, 421 U.S. 794, 798 (1975).

"To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of

prejudicial pretrial publicity." *Id., citing Sheppard v. Maxwell*, 384 U.S. 333 (1966). In *Sheppard* the jurors were exposed to newspaper, radio, and television coverage of the trial when not taking part in the proceedings. Prior to the trial there was a substantial amount of media coverage of evidence that was not allowed in the trial. The jury was not sequestered until the case was submitted to the jury for deliberations. The *Sheppard* Court found the jurors were allowed to go their separate ways outside of the courtroom without adequate directions not to read or listen to anything concerning the case. The *Sheppard* trial judge "suggested" to the jury that they not read any newspaper articles or listen to television or radio comments about the trial. *Id.* at 353-55. Moreover, in the *Sheppard* case, the trial was heavily covered by the media and found to have a "carnival atmosphere." *Id.* at 358. The Supreme Court determined that the failure of the state trial judge to protect Sheppard from inherently prejudicial publicity which saturated the community, and to control disruptive influences in the courtroom, deprived defendant of a fair trial consistent with due process. *Id.* at 363.

For Petitioner to demonstrate a due process violation during his criminal trial, he must show that his trial resulted in "identifiable prejudice," or at the time of his trial, the publicity was such that it "gave rise to a presumption of prejudice because it involved 'such a probability that prejudice [would have] result[ed] that it is deemed inherently lacking in due process.'" *Estes v. Texas*, 381 U.S. 532, 542-543 (1965). "In deciding whether such a presumption of

prejudice is warranted, courts must examine 'any indications in the totality of circumstances that petitioner's trial was not fundamentally fair.' *Murphy v. Florida*, 421 U.S. 794, 799 (1975)." *Brecheen v. Oklahoma*, 485 U.S. 909, 910 (1988).

Petitioner claims the exhaustive pretrial publicity, knowledge of the crime by virtually all individuals in Union County, and the angry public sentiment permeating the community prior to his trial resulted in an unconstitutional trial by a partial jury in violation of his due process rights. Petitioner contends that at the time of the murders, Union County was a community of approximately 12,000 people and that the local and regional press gave the murders excessive attention. According to an affidavit by Ken Holt, THE KNOXVILLE NEWS-SENTINEL had a circulation of 523 daily and 939 "Sunday only" subscribers in Union County presumably in 1986. THE KNOXVILLE JOURNAL had a daily circulation of 694 in Union County at that time. According to the affidavit, THE KNOXVILLE NEWS-SENTINEL carried seven articles on the crime between March 18, 1986 and September 19, 1986.[34] THE KNOXVILLE JOURNAL published articles regarding this crime eight times between March 19 and July 1, 1986. Nine feature segments were aired on one television station in March of 1986 and April 4, 1986. Another television station ran eleven feature segments in March of 1986, and segments were aired by a third station on five different days in March of

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[34] The crimes were committed on March 17, 1986, and the Petitioner was convicted on March 24, 1987.

1986. In addition, the affidavit includes other stations that ran features and other newspapers that published articles about the murders in the Spring of 1986.

Petitioner claims that the media coverage increased as the trial neared, but he has not directed the Court to any evidence of coverage immediately preceding the trial other than saying at least five members of the potential juror pool admitted watching the news coverage at night during jury selection. Petitioner contends that, "the pandemic nature of the pre trial publicity in Mr. West's case and the prejudice suffered is readily apparent from the statements of jurors during *voir dire*." [Court File No. III, p. 89].

First, Petitioner contends two potential jurors admitted to having seen media coverage within the days preceding jury selection. Petitioner refers the Court to Mr. Keener who stated that after he was subpoenaed for jury duty he saw the news stating Petitioner and Martin were going to trial for the murder of the victims in this case [Addendum No.4, p. 35]. However, the trial judge excused Keener from serving on Petitioner's jury [Addendum No. 4, pp. 38-39]. Since Keener was excused by the trial judge for cause, Petitioner's reference to Keener does not provide grounds for Petitioner to be granted habeas relief. Hence, Keener's exposure to the pretrial media coverage does not benefit Petitioner in his claim.

Petitioner contends Mr. Caldwell saw media coverage within days preceding jury selection. When asked what he had heard or read in the last few

days, Mr. Caldwell replied, "Well, I haven't read anything. I haven't watched television much, just mostly - I haven't read or heard that much" [Addendum No.6, pp. 92-93]. When questioned further, Mr. Caldwell said he and the other jurors had discussed that the case may last a long time [Addendum No. 6, pp. 93-94]. The record does not demonstrate that Mr. Caldwell was exposed to any media coverage within days preceding the jury selection.

Petitioner identifies Mr. Carpenter as a juror who stated Petitioner would have to prove his innocence before Mr. Carpenter would vote not guilty. Petitioner directed the Court's attention to page 44,11. 20-25 of Vol. 4 to support this claim.[35]

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[35] The following is the colloquy between Mr. Carpenter, Petitioner's trial attorney, and the trial court:

> Mr. Alexander: Let me make it more simple, I think I have gotten myself confused on that one. Would you make the defendant prove to you his innocence at any time during the trial?
>
> Mr. Carpenter: Well, ain't that what a trial is about - prove innocence or guilt?
>
> Mr. Alexander: Your Honor, do you want to ask him any questions?
>
> The Court: I am never sure what jurors are thinking about when they are attempting to answer this question because it is never asked in away that seems to me makes it clear to them. Let me put it this way. Do you understand that everyone charged with a criminal offense is presumed to be innocent until it has been proven beyond a reasonable doubt that he is guilty?
>
> Mr. Carpenter: Yes.

The allegation by Petitioner is incorrect because Mr. Carpenter did not state that Petitioner would have to prove his innocence before Mr. Carpenter could vote not guilty. Petitioner also claims Mrs. Roach is another juror who said she would require Petitioner to prove his innocence. Mrs. Roach did say that at one point However, she later explained that she misunderstood the question and stated she would not require Petitioner to prove his innocence before she could vote not guilty. Mrs. Roach further acknowledged that Petitioner had no burden to prove his innocence but the State had to prove guilt beyond a reasonable doubt [Addendum No. 4, pp. 14-21].

The Court: Do you agree with that proposition?

Mr. Carpenter: Yeah.

The Court: Do you agree that in this case, that unless the State proves beyond a reasonable doubt that Stephen West is guilty of some offense, that it would be your duty to find him not guilty?

Mr. Carpenter: Yes.

The Court: Do you have any problems with that proposition?

Mr. Carpenter: No.

The Court: Do you in any way believe that a defendant is required to prove that he is innocent in a criminal case? As opposed to the State being require to prove that he is guilty?

Mr. Carpenter: No.

Nevertheless, Mrs. Roach was excused and did not serve on Petitioner's jury.[36]

Next Petitioner avers that prospective juror Mr. Gentry stated Petitioner would have to prove his innocence before he could vote not guilty. Once again, Petitioner attacks responses from a person who did not serve on his jury. Consequently the Court does not fmd that Mr. Gentry's alleged lack of impartiality deprived Petitioner of any constitutional rights. Petitioner also claims Mr. Bounds, another person who ultimately did not serve on Petitioner's jury, said he would require Petitioner to prove his innocence before he would vote not guilty. However, there was no constitutional violation since Mr. Bounds did not serve on Petitioner's jury [Addendum No. 7, pp. 17-19].

Petitioner also complains that Mr. Beeler, another person who did not ultimately serve on Petitioner's jury, stated Petitioner would have to prove his innocence before he would vote not guilty. Mr. Beeler was excused by the Court. Petitioner next complains that Mr. Brewer stated Petitioner would have to prove his innocence before he could vote not guilty. However, Respondent contends Mr. Brewer was excused because the State used a peremptory challenge [Addendum No. 7, pp. 71, 126]. Consequently, Petitioner did not suffer any

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[36] Although the Court must focus on the jurors that actually sat on Petitioner's case, *see Ross v. Oklahoma*, 487 U.S. 81 (1988), it observes that at the time the jury was seated, the defense had one peremptory challenge remaining which it could have used to unseat any juror it believed was not impartial.

constitutional violation since neither Mr. Beeler or Mr. Brewer served on Petitioner's jury.

In addition, Petitioner complains that some jurors stated Petitioner would have to demonstrate that he attempted to stop the murders before they would exonerate him. Again, Petitioner complains about a response by Mr. Gentry Mr. Gentry did not serve on Petitioner's jury as he was excused for cause by the trial Court. Petitioner also complains that Mr. Sexton responded that if Petitioner did not try to stop the perpetrator of the crimes, he would probably find him guilty. However, after an extensive questioning, Mr. Sexton was excused for cause by the trial court. Consequently, since neither of these prospective jurors served on Petitioner's jury, the Court does not find any constitutional violation.

Petitioner then contends that a prospective juror stated she was ready to hang Petitioner based on what she had read in the papers. The record reflects that Mrs, Shoffner admitted that initially, after reading the paper, she was ready to hang Petitioner. Nevertheless, Mrs. Shoffner explained that she would be able to render a verdict based strictly on the evidence presented at trial [Addendum No. 4, p. 107]. However, Mrs. Shoffner was excused for cause and did not serve on Petitioner's jury. Consequently, Petitioner's complaint about Mrs. Shoffner does not provide grounds for habeas relief.

To support his allegation that he was prejudiced by the "pandemic nature of the pretrial publicity," Petitioner cites the *voir dire* of several prospective jurors. First, Petitioner cites to Mr. Padgett's *voir*

dire where Mr. Padgett states that he had heard rumors that some people thought Petitioner was guilty and that he should get the death penalty. Mr. Padgett said he was talking to a couple of people the day before he had to appear for jury duty and they were talking about the role of the jurors and one thing led to another, and the people with whom he was talking thought that both defendants were guilty. However, Mr. Padgett proceeded to testify during *voir dire* that he did not think they were attempting to influence his judgment and that it did not affect his ability to sit as a fair and impartial juror. Mr. Padgett testified that there had been quite a bit of talk about this case in Union County.[37] Mr. Padgett said that what he had heard would not

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[37] Mr. McConnell: Has there been quite a bit of talk in Union County about this case, sir?

Mr. Padgett: Well, quite a bit.

Mr. McConnell: And you have been present during quite a bit of it?

Mr. Padgett: Yes, sir.

Mr. McConnell: Is it a pretty good topic of discussion?

Mr. Padgett: Yes, sir.

Mr. McConnell: And has that continued pretty much since the crimes were committed? Right on through?

Mr. Padgett: Yes, mostly more of the talk for the last two or three weeks -

Mr. McConnell: Since the trial is coming up?

Mr. Padgett: Uh huh (meaning yes by sound).

Addendum No.3, pp. 99-100]

influence him at all, and he had not formed or expressed an opinion about Petitioner's guilt. Mr. Padgett was accepted as a juror, and there is nothing in the record to demonstrate he was not impartial. Furthermore, Petitioner could have excused Mr. Padgett as a juror since Petitioner had not exhausted his peremptory challenges.

Petitioner also identifies the *voir dire* of prospective juror Mr. Edmondson as an example of the extent to which the pretrial publicity had infected the community. However, the Court does not find anything in the *voir dire* to indicate the "trial atmosphere was utterly corrupted by press coverage,"[38] but rather, the *voir dire* simply reveals that the community was well aware of the crimes and the alleged perpetrators. Moreover, Mr. Edmondson was excused for cause from the jury.

Again, Petitioner has cited to the *voir dire* of Mr. Keener to demonstrate the extent the pretrial publicity had infected the community. However, Mr. Keener was excused from Petitioner's jury. Moreover, nothing during Mr. Keener's *voir dire* indicates a presumption of prejudice is warranted due to the pretrial publicity of this case.

Next, Petitioner cites to Mr. Shoffner's *voir dire* to demonstrate the pretrial publicity was so extensive that it corrupted the trial atmosphere. Mr. Shoffner testified that everyone had heard about this case [Addendum No. 4, p. 94], which only indicates that the community had knowledge of the crimes.

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[38] *Murphy v. Florida*, 421 U.S. 794, 798 (1975).

Apparently Petitioner's trial counsel did not think the publicity prejudiced Mr. Shoffner because counsel accepted Mr. Shoffner as a juror even though counsel had not exhausted all peremptory challenges.

Once again Petitioner refers to Mrs. Shaffner,[39] another prospective juror Petitioner identifies to support his claim that the pretrial publicity corrupted the trial atmosphere. As previously noted, Mrs. Shoffner was eventually excused for cause [Addendum No. 4, p. 107; Addendum No. 5, pp. 147-149]. Petitioner's allegations regarding Mrs. Shoffner do not demonstrate that the pretrial publicity was so extensive that it corrupted the trial atmosphere. Although the pretrial publicity immediately following the crimes appears to have been substantial, the record does not show that it was so extensive or damaging so as to deprive Petitioner of an impartial jury. *Cf. Irvin v. Dowd*, 366 U.S. 717, 725 (1961) (The media coverage was so pervasive that curbside opinion as to petitioner's guilt and the punishment he should receive were "solicited and recorded on the public streets by a roving reporter, and later broadcast over local stations.").

Mr. Elkins is another juror Petitioner claims demonstrates that he was prejudiced by the pretrial publicity. Mr. Elkins lived in the Big Ridge community where these crimes occurred. Mr. Elkins testified that most people with whom he spoke

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[39] Mrs. Shoffner stated her husband is related to J.D. Shoffner, the previously referred to juror.

thought the defendants were guilty of the crimes. This statement demonstrates the community had knowledge of the crimes, but it does not prove that Mr. Elkins was prejudiced by the pretrial publicity. Furthermore, Mr. Elkins was peremptorily excused from serving on the jury [Addendum No. 5, p. 94]. Petitioner cites to two other jurors who discussed the community's knowledge of the crimes but their *voir dire* does not indicate anything more than the fact that the community had knowledge of the crimes and many believed the defendants were guilty [Addendum No. 3, pp. 78-79, 97-98].

Although the record demonstrates a substantial amount of pretrial publicity immediately after the crimes were committed, the record further reflects that coverage was virtually non-existent for more than six months prior to the trial. In addition, the majority of the information in the newspapers was factual evidence which was admitted into evidence at the trial. The *voir dire* in Petitioner's case does not indicate that the jurors were hostile toward him, nor does it demonstrate that the jurors who served on Petitioner's jury had a partiality that could not be set aside. There is no evidence that there was a barrage of media coverage immediately preceding the trial. To the contrary, the record indicates there was virtually no media coverage for six months prior to trial other than an announcement on the news that the Petitioner's trial for these crimes was about to begin. There was also a newspaper article in THE KNOXVILLE JOURNAL on Tuesday, March 17, 1987, that revealed only two jurors had been seated for this trial.

The jury in this case was sequestered on March 17, 1987, and the trial court admonished the jury not to read, listen to, discuss, or watch anything regarding this case [Addendum No. 7, p. 137]. It appears that the only media coverage the jurors who sat on the jury were exposed to immediately prior to trial was television news announcing the trial was beginning and possibly the one newspaper article in the Knoxville newspaper. Petitioner has not demonstrated that any of the twelve jurors who actually decided his case had formed an opinion that he was guilty. Although the twelve jurors who decided Petitioner's case previously may have read or heard about the case, none of these twelve jurors indicated the pretrial publicity would affect their ability to judge Petitioner solely on the basis of the evidence presented at trial.

Petitioner has not demonstrated that the trial court failed to insulate the proceedings from prejudicial publicity or that disruptive influences deprived him of a chance to receive a fair trial. Nor has Petitioner shown that the media coverage prejudiced him. Although at times, a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process, such is not the case before the Court. *See Estes v. Texas*, 381 U.S. at 542-43 (Defendant was deprived of due process by the telecasting of his notorious, heavily publicized, and highly sensational criminal trial). Petitioner herein has not demonstrated that the procedure employed by the State involved such a probability that prejudice would result that it is deemed inherently

lacking in due process so as to excuse him from demonstrating actual prejudice resulted from the publicity. *In re Murchison*, 349 U.S. 133 (1955). This is simply a case where the community was made well aware of the charges against Petitioner. This is not a case that allows this Court to presume unfairness of constitutional magnitude at Petitioner's trial.

On direct appeal the Tennessee Supreme Court resolved the claim that the trial court erred when it denied Petitioner's motion for change of venue against him. "Our reading of the voir dire reveals that the questioning about any bias or prejudice based upon publicity or community comment was carefully explored and the trial judge's participation was clarifying rather than rehabilitative. We find that the trial judge correctly denied defendant's motion to change venue. *See State v. Melson*, 638 S.W.2d 342 (Tenn. 1982) and *State v. Hoover*, 594 S.W.2d 743 (Tenn. Crim. App. 1979)." *State v. West*, 767 S.W.2d 387, 398 (Tenn. 1989).

Petitioner has not demonstrated that the Tennessee Supreme Court's decision was contrary to, or an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[40] Petitioner has not shown anything in

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[40] Although West claims the decision of the Tennessee Supreme Court "is contrary to or an unreasonable application of federal law or based upon an unreasonable determination of the facts[,]" [Court File No. 111, p. 96] he has failed to identify which federal law he claims the state court decision was

the record which requires "a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected." *Dobbert v. Florida*, 432 U.S. at 303. As the Court previously stated, Petitioner has done nothing more than show that the community simply was made aware of the crimes and charges against him. There has been no showing that the media coverage was so extensive that it resulted in corrupting the trial atmosphere and deprived Petitioner of an impartial jury trial. *See Irvin v. Dowd*, 366 U.S. 717 (1961). The Respondent's motion for summary judgment will be **GRANTED**, and Petitioner's claim that the trial court erred in denying his motion for change of venue will be **DISMISSED**.

7. Heinous, Atrocious or Cruel Aggravating Circumstance (Amd. Pet. ¶ IX.A.1.)

In his ninth claim, Petitioner contends that in violation of his Constitutional rights under the Eighth and Fourteenth Amendment, his sentence was based upon vague and invalid aggravating circumstances. Petitioner claims the "heinous, atrocious, or cruel" ("HAC aggravator") aggravating circumstance, as applied in his case, was constitutionally vague and failed to adequately channel juror discretion.

In response, the State contends this claim was not exhausted, and thus, is subject to dismissal

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contrary to or which federal law he claims was unreasonably applied.

without further consideration. Petitioner counters that he did raise this claim at the state post-conviction stage. Petitioner directs this Court to paragraph eight, page eleven, of his amended state post-conviction petition. However, Petitioner has failed to direct the Court to any part of the record that indicates he fairly presented this claim to the state courts on appeal. That is because Petitioner did not raise this claim on direct appeal, nor did he fairly present it to the state courts during his state post-conviction proceedings.

Consequently, it appears that Petitioner has procedurally defaulted this claim and that Respondent should be granted summary judgment on Petitioner's claim that the heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague. However, in light of the recent Sixth Circuit decision in *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004),[41] Petitioner has now filed a notice of supplemental authority and cites the recent Sixth Circuit case to assert that he has not procedurally defaulted this HAC aggravator claim asserting that the Supreme Court of Tennessee implicitly reviewed his death sentence for arbitrariness, even though he did not explicitly raise the HAC aggravator issue on direct review.

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[41] It appears that a petition for an en banc hearing which was filed on behalf of Respondent Bell was denied on June 22, 2004. The mandate was issued on July 2, 2004, and a motion to recall the mandate was filed on behalf of Respondent Bell on July 7, 2004. It appears that on July 15, 2004, an order recalling the mandate was filed.

Although the Court has not found a United State Supreme Court opinion that has determined that state mandatory review statutes create an implicit review of constitutional challenges not explicitly raised, and this Court would be inclined to reject the implicit review argument, it will analyze Petitioner's claim under *Cone* since it appears that under present Sixth Circuit law, Petitioner's HAC aggravator claim was previously determined during the mandatory review and thus not procedurally defaulted.

In *Cone*, the HAC aggravator was raised for the first time in a second state post-conviction petition. Cone raised an Eighth Amendment claim alleging that the language of the HAC aggravator considered by the jury in his sentencing hearing was unconstitutionally vague. The state trial court dismissed the second petition and held that all the grounds raised in the second petition were barred because they either had been previously determined or waived. The state appellate courts affirmed the trial court's decision. Cone filed a federal habeas petition which was denied by the district court. The Sixth Circuit Court of Appeals granted Cone's habeas petition with respect to the death sentence and ruled that Cone had been denied effective assistance of counsel during the sentencing phase of his trial. The United States Supreme Court reversed the Sixth Circuit, and remanded the case back to the lower court.

The Sixth Circuit on remand first addressed the state's contention that Cone's Eighth Amendment claim that the HAC aggravating factor was unconstitutionally vague had been procedurally

defaulted. The Sixth Circuit first determined whether the HAC claim had been "waived" or "previously determined." Noting that if Cone waived his claim, the waiver would constitute procedural default, the court concluded it was "previously determined" because it construed Tennessee's mandatory review statute[42] to encompass constitutional issues not explicitly raised on direct review. Under that construction, the Sixth Circuit determined that the Tennessee Supreme Court considered the constitutionality of the HAC aggravator and hence, ruled that *Cone* did not procedurally default on the claim.

Applying *Cone* to the instant case, this Court must conclude that the Tennessee Supreme Court

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[42] In death penalty cases the Tennessee Supreme Court is required to conduct a mandatory death penalty review to determine whether:

(1) The sentence of death was imposed in *any arbitrary* fashion;

(2) The evidence supports the jury's findings of a statutory aggravating circumstance or statutory aggravating circumstances;

(3) The evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found; and

(4) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

TENN. CODE ANN. § 39-2-205(C) (1982) (emphasis added) (current version at TENN. CODE ANN. § 39-13-206(c)(1) (2003).

reviewed the sentencing proceedings in Petitioner's case to ensure that the jurors did not impose the death penalty "in any arbitrary fashion." TENN. CODE ANN. § 39-2-205(c). Likewise, since *Cone* teaches that the Supreme Court has "characterized death sentences imposed without appropriately narrowing instructions as having been imposed *arbitrarily* and upon criteria, *i.e.*, statutory aggravating factors, whose language is unconstitutionally vague[,]" *id.* at *5 [citations omitted] [emphasis in original], then this Court must conclude "that the Tennessee Supreme Court implicitly considered and rejected [Petitioner's] unmentioned vagueness 'challenge' to the HAC aggravator, in the course of its mandatory review statute." *Cone v. Bell*, 359 F.3d at 793.

Like *Cone*, Petitioner's unconstitutional HAC aggravator issue was not explicitly raised in the trial court or on direct review. However, Petitioner has now raised the same claim raised in *Cone*—an Eighth Amendment claim that the HAC aggravating factor was unconstitutionally vague, which, in accordance with the ruling of *Cone*, the Court must conclude the Tennessee Supreme Court implicitly considered and rejected in the course of its mandatory review. Therefore, deeming Petitioner's HAC aggravator claim as having been decided on the merits during the direct appeal, it necessarily follows that when the Tennessee courts disposed of this claim on procedural grounds, they did so because it was "previously determined." Consequently, applying the Sixth Circuit's *Cone* decision, this claim is a proper subject for federal habeas review.

Turning to the merits of Petitioner's habeas claim that the HAC aggravator considered by the jury in sentencing him to death was constitutionally vague, the Court must determine if the Tennessee Supreme Court's decision resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Applying the *Cone* decision, the Court must conclude that "*Godfrey*[43] represents a 'clearly established' Supreme Court precedent dictating that Tennessee's HAC aggravator is unconstitutionally vague." *Cone v. Bell*, 359 F.3d at 796-97. Hence, the question before this Court is whether the limiting instruction saved the HAC aggravator in Petitioner's case.

The following instruction was given in Petitioner's case:

> No death penalty shall be imposed but upon an unanimous finding by the jury that one or more of the following specified statutory aggravating circumstances have been proved on the trial and/or on the sentencing hearing beyond a reasonable doubt
>
> 1. The murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind.

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[43] *Godfrey v. Georgia*, 446 U.S. 420 (1980).

These words are defined as follows: Heinous: Grossly wicked or reprehensible, abominable, odious, vile, atrocious, extremely evil or cruel, monstrous, exceptionally bad, abominable, cruel, disposed to inflict pain or suffering, causing suffering, pain, torture. The infliction of severe physical pain as a means of punishment or coercion. The experience in this. [sic] Mental anguish, any method or thing that causes such pain or anguish. To inflict with great physical or mental pain.

Depravity: Moral corruption, wicked or perverse acts.

Our statute provides that is the murder which must be especially heinous, atrocious or cruel. The words involve torture or depravity of mind qualifies, limits and restricts the words "especially heinous, atrocious or cruel." Torturing means the infliction of severe physical or mental pain upon the victim while the victim remains alive and conscious. Such torturing involves depravity of mind.

Depravity of mind may in some circumstances be shown although torture as above referred to did not occur. If acts occurring after the death of a victim are relied upon, to show depravity of mind of the murderer, such acts must be shown to have occurred so close to the time of

> the victim's death and must have been of such a nature that the inference can be fairly drawn that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim. This is true because it is murderer's [sic] state of mind at the time of the killing which must be shown to have been depraved.

[Addendum No. 14, pp. 9-10]. The jury specifically found "[t]he murder was especially heinous and atrocious in that it involved torture" [Addendum No. 14, p. 17].

In *Cone*, during the sentencing phase, the jury was instructed that it could not impose the death penalty unless the jurors unanimously found beyond a reasonable doubt at least one of several statutory aggravating factors, one of which was that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Cone v. Bell*, 359 F.3d at 794. Some of the terms of this aggravating circumstance were defined in a limiting instruction:

> "Heinous" means extremely wicked or shockingly evil.
> "Atrocious" means outrageously wicked and vile.
> "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

Id. at 794-95. The jury determined the murder was "especially heinous, atrocious, or cruel," but did not include the language "in that it involved torture or depravity of mind," which the Sixth Circuit did not deem constitutionally significant.

The proper standard for reviewing a claim that a jury instruction caused impermissible jury confusion is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution of the United States. *Jones v. United States*, 527 U.S. 373 (1999). The jury instruction may not be judged in artificial isolation, but must be judged in the context of the instructions as a whole. *Estelle v. McGuire*, 502 U.S. 62, 72-73 (1991). In determining whether an aggravating circumstance is constitutional, a habeas court must find (1) the circumstance must not apply to every defendant convicted of murder, and (2) the circumstance must not be unconstitutionally vague. *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). A circumstance is not unconstitutional if it has some "common-sense core of meaning ... that criminal juries should be capable of understanding." *Id.* at 973.

A statutory aggravator, "that the offense 'was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,'" was held unconstitutional in *Godfrey v. Georgia*, 466 U.S. 420 (1980), because there was nothing in those few words that "implied any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Cone v. Bell*, 359 F.3d at 795 (citing *Godfrey v. Georgia*,

466 U.S. at 428). In 1988 the United States Supreme Court held that the Oklahoma HAC aggravator (the outrageously or wantonly vile, horrible or inhuman aggravator) was unconstitutionally vague, but implied it may have been constitutional if it had been further limited by a "torture or serious physical abuse" instruction. *Maynard v. Cartwright*, 486 U.S. 356, 365 (1988).

Thus, in reviewing the state court's application of this statutory aggravating circumstance, and applying *Cone v. Bell*, 359 F.3d at 794-95, the HAC aggravator the jurors used to sentence Petitioner to death, "[t]he murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind," is itself too vague to provide any guidance to the sentencer. *See Walton v. Arizona*, 497 U.S. 639, 654 (1990). Since this statutory aggravator is vague, this Court must now determine whether the state court's limiting instruction, which further defined the vague terms, was constitutionally sufficient, such that it provided some guidance to the jurors so that they could appropriately channel and narrow their discretion. *Walton v. Arizona*, 497 U.S. at 654.

Based upon its review, the Court finds that the definition of torture given to the Petitioner's jury was constitutionally sufficient in that it provided guidance to the jury. The jury instruction on torture required a finding of infliction of severe physical or mental pain upon the victim while the victim remained alive and conscious [Addendum No. 14, p. 10]. The jury specifically found "[t]he murder was especially heinous and atrocious in that it involved

torture" [Addendum No. 14, p. 17]. Thus, the trial court's use and definition of torture, a word that has not been found to be too vague under *Godfrey*, removed any vagueness and narrowed the class of persons eligible for the death penalty to those who commit more aggravated murder. Consequently, the trial court's instruction on torture and the jury's specific finding that the murder involved torture confirms the Court's conclusion that the jury's discretion was appropriately channeled and narrowed. *See Coe v. Bell*, 161 F.3d 320, 335-36 (6th Cir. 1998) ("[T]he jury ignored the problematic 'depravity' factor and limited its finding to the appropriately narrowing 'torture' factor, confirming that finding in a specific, handwritten verdict form.... [T]he fact that we have this evidence from the jury itself confirms our conclusion that the jury's discretion was channeled and narrowed appropriately.")

Needless to say, as described below, the evidence in Petitioner's trial was sufficient to support the HAC aggravator because there is no question that the victims were subjected to torture. Dr. Blake, the forensic pathologist who performed the autopsies on the victims in this case, testified at trial that the young victim had a large number of stab wounds on her body, including numerous torture wounds:

> She had multiple stab wounds to the front of the chest, including two large wounds into the middle and left front of the chest. She had three wounds, stab wounds that measured up to four or five centimeters, say an inch and a half in

greatest width, and went into the chest up to five and one-half inches deep. Three wounds went through the heart itself, caused the - those were the lethal wounds on Sheila. They went through the heart, out the back side of the heart, and one of then went so far as to into the aorta.

From front to back, three wounds, three stab wounds went through the chest wall, through the ribs and between the ribs, through the heart, out the back side of the heart, and one of them through - went into the aorta. This caused the massive hemorrhage into her chest and into her left chest. She had two or three pints of blood in her left chest, and of course, she had drained some out onto the premises. She had these wounds were up to five and on-half inches deep, five and one-half inches long, in other words, a blade would have to be of such length as to inflict a five and one-half inch wound, that is through the chest wall, across the heart, and out the back side of the heart and into the aorta. This caused the left lung to collapse and force a lot of blood into the chest. There were a group of perforating stab wounds to the abdomen, penetrating into the abdominal cavity. Seventeen wounds were present into her abdomen. There were fourteen

> superficial nicks or cuts of the anterior [front] abdomen and the right flank.
>
> These - some of them were little point pricks with a knife blade, just enough to stick into the skin, something that I would regard as a *torture type*, and not an intentional thrust all the way into the body, but there were numerous of these *torture type* cuts. Just pushing a knife blade into the skin enough to inflict pain. There were fourteen of those type of wounds. In the abdomen, she had wounds that went into the liver, went into the mesentery of the bowel. That is the supportive membrane that has all of the blood vessels that supplies the bowel, and one of them went into the deep muscles of the spine, beside of the spine, called the psoas muscle, was one of the quite deep wounds that went into the abdomen. She had a small stab wound on her left forearm. She had a small defense stab wound at the base of the left thumb.

[Emphasis added] [Addendum No. 9, pp. 33-36]. According to Dr. Blake, the young victim was on her menstrual period and her hymenal ring had a hemorrhagic margin, a bruised margin indicating a forceful entry. In Dr. Blake's opinion, to a reasonable degree of medical scientific certainty, the young victim had been sexually assaulted. He testified it was forceful enough to cause a bruise around the entire opening which would be inconsistent with normal, comfortable sexual relations and consistent

with a forceful penetration [Addendum No. 9, pp. 36-38].

Dr. Blake explained in detail about the wounds, and how the perpetrator stabbed the victim and then partially took the knife out and shoved it back in at a slightly different angle on certain wounds. Other wounds were described as slashing wounds from right to left and the wound where her bowel was protruding was made by twisting a knife [Addendum No. 9, pp. 39-43]. In addition, Dr. Blake testified the young victim would have suffered a great deal of pain from the various stab wounds to her body. Dr. Blake testified that the older victim had similar wounds [Addendum No. 9, pp. 58-64].

When explaining his opinion that the injuries to the victims were inflicted by two individuals, Dr. Blake further explained the torture wounds as follows:

> The fact that there are torture type wounds and that is the only term I know to use for these little thick shaped triangular punctures of the skin that are present on the back of Shelia Romines, and as I say, on the back of Wanda Romines and on the front of Shelia Romines. These are restraining type injuries to keep a person immobilized, to keep them still. A knife stuck into the skin is very effective to turn to move them and I see these type of wounds on the back of Shelia Romines and on the back of Wanda Romines, these small stab

> penetrations. There is no intent by a - these do not indicate the intent to push a knife through the skin or to stab a person. That is a holding pattern, if you will. And on the front of Shelia Romines, there are eight (8) or nine (9) of these. So, my conclusion is that two people were involved in the infliction of the wounds, as well as participating in keeping these two women separated until there were probably both brought to the end of their lives, with these horrible stab wounds.

[Addendum No.9, pp. 66-68].

Petitioner likewise testified about the torturous deaths. When Petitioner followed Martin into the young victim's room, she had her hands tied behind her and got up on her knees and asked Petitioner to please not let Martin kill her; she fell back after Martin apparently punched her, and Petitioner saw that her stomach was bleeding. The testimony by Petitioner himself revealed that his co-defendant had stabbed the young victim numerous times and kept stabbing her again and again, laughing as she asked him why. Petitioner testified his co-defendant responded that he owed her and then "these big things were coming out of her stomach, and Ronnie was tasting them" [Addendum No. 11, p. 95]. Accordingly, there is no doubt that the evidence supported the fmding of torture in Petitioner's case.

In this case, it appears that the jury limited its finding to the "appropriately narrowing 'torture' factor, confirming that finding in a specific,

handwritten verdict form." *Coe v. Bell*, 161 F.3d at 335-36. Unlike *Maynard* and *Walton*, where the narrowing factor was only applied by a reviewing court, not by the jury itself, Petitioner's case involves a situation where the jury specifically found torture; as in the *Coe* case, "the fact that we have this evidence from the jury itself confirms our conclusion that the jury's discretion was channeled and narrowed appropriately." *Id.* As in the *Coe* case, the jury in Petitioner's case held more narrowly that "[t]he murder was especially heinous and atrocious in that it involved torture" [Addendum No. 14, p. 17].

It is evident from the facts recited above that there is more than ample evidence to support the jury's conclusion. For the foregoing reasons, the Court holds that the application of the "heinous, atrocious, or cruel" aggravating circumstance applied to Petitioner's case did not violate his constitutional rights because the state court provided appropriate narrowing instructions and the jury channeled and narrowed its discretion appropriately in finding the "the murder was especially heinous and atrocious in that it involved torture" [Addendum No. 14, p. 17]. Consequently, Petitioner's sentence was not imposed arbitrarily. Petitioner has not demonstrated that the Tennessee Supreme Court's decision resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States. Accordingly, the Court will **GRANT** summary judgment to Respondent on this claim and will **DISMISS** Petitioner's claim that the HAC aggravator, as applied in his case, is

constitutionally vague and failed to adequately channel juror discretion.

8. Avoiding Arrest and Prosecution Aggravator (Amd. Pet. ¶ IX.B.1)

Petitioner claims the Tennessee Avoiding Arrest aggravating circumstance does not effectively narrow the class of death eligible person rendering it invalid. In the state court proceedings Petitioner claimed there was insufficient evidence to support the jury's conclusion that he committed two murders for the purpose of avoiding arrest or prosecution. However, the Tennessee Supreme Court determined the claim was actually challenging the constitutionality (whether the aggravating circumstance narrowed the class of death eligible offenders) of the aggravating circumstance that the murders were committed for the purpose of avoiding arrest and prosecution. *State v. West*, 10 S.W.3d 753, 754 (Tenn. 2000).

Respondent contends this claim was not exhausted and thus should be dismissed. Petitioner did not raise this claim on direct review and the state post-conviction courts determined it was barred from reaching the merits because it had been previously determined by its statutorily-required direct appeal review of Petitioner's death sentences and waived because he failed to present it on direct review. However, since the state court found the claim was previously determined by its statutorily-required direct appeal review, the Court will address this claim. *See Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004).

This claim was previously raised in state court and was resolved by the Tennessee Supreme Court

determining that "[a]lthough Petitioner casts the issue as concerning the evidentiary sufficiency of the (i)(6) aggravating circumstance, we think his grievance involves instead the constitutional issue of whether the aggravating circumstance narrows the class of death eligible offenders." *State v. West*, 190 S.W.3d 753, 754 (Tenn. 2000). Under TENN. CODE ANN. § 39-2-205(c)(3) (1982) (repealed 1989) the Tennessee Supreme Court was required, in all cases in which the death penalty was imposed, to consider automatically whether the evidence supported the jury's finding of a statutory aggravating circumstance(s), and such statutorily-required automatic review of the evidentiary sufficiency of both the conviction and sentence was performed in Petitioner's case on direct review [Addendum 43, p. 26].

Tennessee Code Annotated § 39-2-203(i)(6) (1982) (repealed 1989) allows a jury to find a defendant death eligible when "[t]he murder was committed for the purpose of avoiding, interfering with, or prevention a lawful arrest or prosecution of the defendant or another." Petitioner claims this aggravating factor does not adequately channel the jury's discretion and does not narrow the class of death eligible persons in violation of the Eighth Amendment. Statutory aggravating circumstances are constitutional if they meet two requirements. "First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be

unconstitutionally vague." *Tuliaepa v. California*, 512 U.S. 967, 972 (1994).

The Tennessee Supreme Court has held the state must prove only that avoidance of prosecution or arrest was one motive for the killing, in order to establish this aggravating circumstance is applicable. *State v. Bush*, 942 S.W.2d 489, 504 (Tenn. 1997). However, the avoidance of prosecution or arrest does not have to be the sole motive for the murder, *State v. Carter*, 714 S.W.2d 561, 581 (Tenn. 1993), or even the dominant one, as it is in some states, *State v. Smith*, 868 S.W.2d 561, 581 (Tenn. 1993). This aggravator is only applied when evidence supports a finding the victim was killed to prevent the defendant's apprehension and prosecution for a separate offense. *See Carter v. Bell*, 218 F.3d 851, 607 (6th Cir. 2000); *Bush*, 942 S.W.2d at 504. Therefore, this aggravating circumstance meets the first constitutional requirement that the aggravator cannot apply to every defendant convicted of murder.

Apparently during their statutorily required review, the Tennessee Supreme Court determined that a reasonable juror could have found that Petitioner killed or participated in the killing of the victims, in part, because he did not want them to identify him as the perpetrator of the aggravated kidnaping and aggravated rape. *See State v. West*, 19 S.W.3d at 756 (observing that the court was "required in all cases in which the death penalty was imposed to automatically consider whether the 'evidence supports the jury's finding of a statutory aggravating circumstance' under TENN. CODE ANN. § 39-2-205(c)(3) and that "[p]ursuant to these

mandatory provisions, this Court found that the requirements of the statute had, in fact, been met in West's case.") The evidence must be viewed in the light most favorable to the jury's decision and the finding of the jury can be invalidated only if no rational trier of fact could have found the factor beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Considering the fact that Petitioner did not know the victims but his co-defendant did know the victims and could be identified by the victims, and considering the testimony as to what occurred at the victims' home, the evidence supports a finding that a rational trier of fact could have found, beyond a reasonable doubt, that Petitioner participated in these murders so that he would not be identified as one of the perpetrators of the aggravated rape and aggravated kidnaping of these victims.

The Sixth Circuit has previously determined that this aggravating circumstance is not unconstitutionally vague and does not facially violate the Eighth Amendment. *Carter v. Bell*, 218 F.3d 581, 608 (6th Cir. 2000). Accordingly, Petitioner has not demonstrated that the application of this aggravator violated the Eighth Amendment. Consequently, he has not demonstrated that the Tennessee Supreme Court's determination was either contrary to or an unreasonable application of *Tuilaepa*, *Jackson*, or any other clearly established federal law as determined by the Supreme Court; nor has he demonstrated the decision was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The Court

will **DISMISS** on the merits the claim that the aggravating arrest and prosecution claim is invalid and **GRANT** Respondent summary judgment on this claim.

9. Insufficient Evidence (Amd. Pet. ¶ XII)

Based on the United States Supreme Court case of *Jackson v. Virginia*, 443 U.S. 307 (1979), Petitioner claims there was insufficient evidence to support a finding of any of the elements of first degree murder. Specifically, Petitioner claims there was no evidence to establish the *mens rea* elements of first degree murder. Petitioner contends the evidence presented by the State failed to demonstrate, beyond a reasonable doubt, that he committed first degree murder. In addition, Petitioner claims the jury instruction which allowed the jury to find that premeditation could occur "in an instant" relieved the prosecution of its burden of proof and was in violation of a Tennessee Supreme Court opinion, *i.e., State v. Brown*, 836 S.W. 2d 530, 543 (Tenn. 1992).

The Court observes that *Brown*, a Tennessee Supreme Court case, was decided after Petitioner's conviction became final. To the extent Petitioner claims an error of state law, he is not entitled to habeas relief. "A federal court may not issue a writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Habeas courts do not review matters purely of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Houston v. Dutton*, 50 F.3d 381, 384-85 (6th Cir.), *cert. denied*,

516 U.S. 905 (1995). Whether and when state law applies is a matter for state courts to decide. *Mullaney v. Wilbur*, 421 U.S. 684, 690 (1974) (finding federal courts bound by construction of state law by its courts since they "are the ultimate expositors of state law") (citations omitted).

The Sixth Circuit has previously determined that *Brown* did not require issuance of a writ because, "when and how state law applies to a particular case is a matter on which the state Supreme Court has the last word . . . No federal issues are implicated and no federal question is presented in determining whether a change in state law is to be applied retroactively." *Houston v. Dutton*, 50 F.3d at 384-85; *Alley v. Bell*, 101 F. Supp. 2d 588, 657 (W.D. Tenn. 2000). Therefore, to the extent Petitioner is attempting to craft a constitutional claim on the basis of state law, the claim is without merit and Petitioner has failed to state a claim upon which habeas relief can be granted. To the extent Petitioner has raised a state law claim, Respondent is entitled to summary judgment because reliance on *Brown* simply raises a claim under state substantive law, not a cognizable federal claim.

To the extent Petitioner claims the prosecution failed to prove every element of his offense beyond a reasonable doubt, he has stated a cognizable federal habeas claim which the Court will review. On direct review the Tennessee Supreme Court found "that the evidence of defendant's guilt fully satisfies the standard prescribed in *Jackson v. Virginia*, 433 U.S. 307 (1979) and T.R.A.P. 13(e)." *State v. West*, 767 S.W.2d 387, 402 (1989).

Petitioner claims that in violation of the Fourteenth Amendment, his conviction is based upon insufficient evidence to support a finding of first degree murder. Petitioner claims the State was required to establish beyond a reasonable doubt that he acted with premeditation and deliberation. Therefore, according to Petitioner, in looking at the facts in a light most favorable to the prosecution, there are no facts from which premeditation and deliberation could be inferred.

Petitioner did not raise the sufficiency of the evidence on direct appeal, nor did he specifically raise sufficiency of the evidence of premeditation and deliberation as he does in his habeas petition. Although Petitioner did not raise a sufficiency of the evidence claim, the Tennessee Supreme Court did specifically address the sufficiency of the evidence on a constitutional basis and ruled that there was sufficient evidence to sustain Petitioner's first degree murder conviction as prescribed in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (finding that evidence, when viewed in the light most favorable to the prosecution, is sufficient if any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt). Therefore, this Court will only address this claim to the extent it was exhausted on a constitutional basis.

To the extent Petitioner is attempting to raise his sufficiency of the evidence claim under *Jackson v. Virginia*, 443 U.S. 307 (1979), the burden is on him to demonstrate that the evidence, when viewed in the light most favorable to the prosecution, is insufficient and that no rational trier of fact could

have found the essential elements of the offense beyond a reasonable doubt. The standards clearly set out in *Jackson v. Virginia*, 443 U.S. at 324, prohibit a state from obtaining a conviction without proving each and every element of an offense beyond a reasonable doubt. Petitioner must show that the state court decision on this issue was the result of an unreasonable determination of the facts in light of the evidence presented in state court or that the state court decision was contrary to or an unreasonable application of *Jackson*. *See* 28 U.S.C. § 2254(d)(2).

At the time of Petitioner's conviction, first degree murder was defined as follows:

> Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

TENN. CODE ANN. § 39-2402[44] (repealed 1989).

A premeditated killing is a killing in which the intent to kill was formed prior to the act itself, however short the interval between the plan to kill

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[44] The Tennessee statutes were re-numbered prior to the repeal of this statute. Section 39-2402 was renumbered as 39-2-202.

and its execution. *Sikes v. State*, 524 S.W.2d 483 (Tenn. 1978). Premeditation and deliberation are considered to be questions of fact to be determined by the jury from all the circumstances of the killing. *Cagle v. State*, 507 S.W.2d 121 (Tenn. Crim. App. 1973). At the time of Petitioner's trial, under Tennessee law, deliberation required the killing be done with a cool purpose, free from passions of the moment. *See State v. Bullington*, 352 S.W.2d 556, 559 (Tenn. 1976). Deliberation can be shown by demonstrating the act was performed with a cool purpose without passion or provocation. Deliberation can also be shown by the lapse in time when lying in wait until the actual killing. Deliberation and premeditation may be inferred from the manner and circumstances of the killing. *State v. Gentry*, 881 S.W.2d 1, 3-4 (Tenn. Crim. App. 1993). The nature of the proof required before a jury might properly infer either deliberation or premeditation includes "facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, *planning activity*; . . . facts about the *nature of the killing* from which it may be inferred that the manner of the killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design." *Id.* at 4-5 (emphasis in original).

Sufficient evidence supports a conviction if, after viewing the evidence and the inferences to be drawn therefrom, in light most favorable to the prosecution, the Court can conclude that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 324;

Walker v. Russell, 57 F.3d 472, 475 (6th Cir.), *cert. denied*, 516 U.S. 975 (1995). This standard of review does not permit the federal habeas court to make its own subjective determination of guilt or innocence; the standard gives full play to the responsibility of the trier of fact to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from the facts. *Herrera v. Collins*, 506 U.S. 390, 401-02 (1993). This due process guarantee of sufficiency of the evidence extends only to facts needed to establish the elements of the crime.

Pursuant to 28 U.S.C. § 2254(e)(1), a determination of a factual issue made by a state court shall be presumed correct, and the burden is on Petitioner to rebut the presumption of correctness by clear and convincing evidence. Where the state court findings have support in the record, those findings must control, even though the federal habeas court may be inclined to render other findings which also have support in the record. *See* 28 U.S.C. § 2254(d)(2); *Wainwright v. Goode*, 464 U.S. 78, 85 (1983).

Circumstantial evidence alone is sufficient to sustain a criminal conviction, and the prosecution does not have an affirmative duty to rule out every theory except that of guilt beyond a reasonable doubt. *See Holland v. United States*, 348 U.S. 121, 140 (1954), *United States v. Cantrell*, 278 F.3d 543 (6th Cir. 2001); *United States v. Avery*, 128 F.3d 966, 971 (6th Cir. 1997) (citing *United States v. Townsend*, 796 F.2d 158, 161 (6th Cir. 1986) ("Circumstantial evidence on its own can sustain a jury's verdict, and such circumstantial evidence need

not remove every reasonable possibility of doubt."); *United States v. Ledezema*, 26 F.3d 636, 641 (6th Cir.), *cert. denied*, 513 U.S. 942 (1994).

Witness credibility is an issue to be left solely within the province of the jury, *United States v. Schultz*, 855 F.2d 1217, 1221 (6th Cir. 1988), and substantial deference should be given to the trier of fact *United States v. Ayotte*, 741 F.2d 865, 867 (6th Cir.), *cert. denied*, 469 U.S. 1076 (1984). A conviction should be affirmed if any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *United States v. Bourjaily*, 781 F.2d 539, 544 (6th Cir.), *cert. granted in part*, 479 U.S. 881 (1986), *aff'd*, 483 U.S. 171 (1987). The Sixth Circuit has previously found that the appellant "bears a heavy burden" when insufficiency of the evidence is claimed. *United States v. Vannerson*, 786 F.2d 221, 225 (6th Cir.), *cert. denied*, 476 U.S. 1123 (1986).

In looking at the facts in a light that is most favorable to the prosecution there are facts from which premeditation and deliberation could be inferred. In Petitioner's case, much of the evidence of deliberation also provides support for premeditation. Premeditation is an action requiring thought beforehand. *See Alley v. Bell*, 101 F. Supp. 2d 588, 656-657 (W.D. Tenn. 2000), *aff'd*, 307 F.3d 380 (6th Cir. 2002), *cert. denied*, 124 S. Ct. 99 (2003). Deliberation means the person was able to evaluate his choice. *Id.* at 655. The facts of premeditation and deliberation must be determined by Petitioner's conduct in light of the circumstances and evidence of this crime. The proof of premeditation and deliberation in this case comes from the physical

evidence found at the house, witness statements, and Petitioner's statements, which included several conflicting statements by Petitioner.

The undisputed facts are that the Petitioner and his co-defendant drove by the victims' house several times prior to stopping and going to the door. At some point in time after going by the victims' house but prior to going up to the door, the defendants went by a house where Martin obtained a butcher knife. Petitioner and Martin drove by the victims' home while Mr. Romines was there but stopped only after Mr. Romines had departed for work. As the Tennessee Supreme Court said on direct appeal, "[t]hey lay in wait in the vicinity of the Romines' house until Jack Romines, husband and father of the victims, left the house to go to work about 5:20 a.m." *State v. West*, 767 S.W.2d 387, 390 (Tenn. 1989). Petitioner and co-defendant were armed when they entered the victims' residence.

The victims were forced into sex acts and then murdered. Petitioner claims he was a victim and was forced to have sex with the young victim. According to Petitioner, the young victim was on top of him when they had sexual intercourse. Dr. Blake's testimony that the young victim was bruised to the extent she was, in his opinion, sexually assaulted, contradicts Petitioner's claim. Dr. Blake testified that the bruising around the young victim's entire vaginal opening was "inconsistent with normal, comfortable sexual relations. She would have had some pain from this, from the bruising and stretching of the tissues, and it is consistent with a forceable [sic] penetration" [Addendum No. 9, pp. 37-

38]. The facts stated above support the jury's conclusion of a reflective deliberate act of rape and that Petitioner and Martin were lying in wait to commit rape and murder. Petitioner testified that at least two knives and a gun were used during the commission of these crimes. Therefore, when the evidence is viewed in a light most favorable to the prosecution, the facts clearly support the jury finding of premeditation and deliberation resulting in first degree murder.

Petitioner's version of the facts demonstrated that there were times when he could have at least attempted to put an end to this travesty, but did nothing. In addition to the fact that Petitioner and Martin drove by the house, obtained a knife, and waited for Mr. Romines to leave prior to approaching the residence, the proof also demonstrated that Petitioner had the ability[45] and ample opportunity to stop the killings, or at least run to a neighbor's home and seek help. The fact that Petitioner never attempted to stop this brutal crime is further proof of his participation in the premeditated and deliberate murder of these two victims. Petitioner testified about events that occurred after the initial rape where he was alone with one victim at a time in the living room or one of the bedrooms, and Martin and the other victim were in a different room. Therefore, as the Tennessee Supreme Court stated:

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[45] Petitioner had served three years in the military and was approximately five years older than Martin, was approximately three inches taller than him, and weighed about thirty pounds more than Martin.

> It is patently obvious that defendant could have gained the upper hand over Martin and brought the tragic events to a halt if he had been so inclined. As an alternative, he could have easily escaped to a neighbor's house for help if he was really as cowardly as represented. Those opportunities continued to occur after it became apparent, by defendant's own admissions, that Martin intended to kill both women. Defendant was asked on direct examination why he did not try to stop Martin. His response was "I couldn't do nothing". [sic] Later on he said that he was incapable of doing what Martin did, and that he "couldn't even clean a fish."

State v. West, 767 S.W.2d at 390-91.

The State's theory was that one seventeen-year old male, Martin, did not control Ms. Romines, Mrs. Romines, and Petitioner, and commit all of these crimes by himself. Of course, the State also emphasized the numerous statements Petitioner gave describing the events that resulted in these tragic crimes. The State argued that if Petitioner really was a victim, it made no sense that Martin would make him wear gloves and wipe fingerprints off of the guns.[46] The State argued that Petitioner's

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[46] It seems curious that a perpetrator would allow a victim to possess weapons which the victim could use against the perpetrator. This line of testimony also raises the question of why Petitioner, an alleged innocent victim, did not use the weapons against Martin when he was holding the weapons and

claim he was a victim in these crimes and forced to participate is incredulous, especially since he had the opportunity, but never even attempted, to stop these murders. It makes little sense that three people could not overpower one, especially when one of the alleged victims, by his own admission, at times had weapons in his possession. Nor is it reasonable to believe that Martin would leave one victim, the only eyewitness, alive, if Petitioner was indeed a forced accomplice to the rape and murders.

Moreover, Petitioner's claim of innocence would have required the jury to draw a series of improbable inferences from the basic facts: namely, the inference that the victim bruised herself while on top of Petitioner during sexual intercourse; Martin forced Petitioner to have sexual intercourse with the victim; Martin bound both female victims but did not restrain the male victim, Petitioner; Martin was able to control both female victims and Petitioner at knifepoint until he could restrain the women; the women resisted as evidenced by the defensive wounds but Petitioner did not resist; Martin had to stab (numerous torture wounds were on each victim) both female victims to control them but controlled Petitioner without restraining him or injuring him in any way; and both female victims were brutally murdered while the male victim, Petitioner, was left alive and unharmed. It is evident from the record

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wiping off fingerprints or at least use the weapons as a means of obviating any control by Martin and fleeing the scene to seek help.

that the jury did not believe Petitioner's version of the facts.

In addition, Petitioner claims the State did not demonstrate that the killings occurred when the mind was "free from the influence of excitement, or passion. *Brown*, 836 S.W.2d at 540." [Doc. 111]. Petitioner testified during his trial and presented no evidence that the murders were committed under the under the influence of excitement or passion. To the contrary, Petitioner testified that Martin was enjoying the events and as Petitioner watched Martin stab the young victim, Martin laughed. Although Petitioner claimed he was a victim and had been threatened by Martin at gunpoint, Petitioner did not testify that he was under the influence of excitement or passion. Petitioner's behavior supports the jury's finding that the murder was premeditated and deliberate and does not demonstrate Petitioner was under the influence of excitement or passion. The circumstances of this violence do not reflect heat of passion, but rather, acts that were the product of a plan and reflection.

The record supports a rational trier of fact inferring, beyond a reasonable doubt, that Petitioner and Martin had the intent to kill the victims as part of their scheme of crime. Petitioner certainly had the opportunity to premeditate and deliberate before committing these crimes. The trier of fact was not required to accept the credibility of Petitioner or believe his account or his explanation of how the crimes occurred. The evidence in the record clearly supports the jury's finding that Petitioner possessed the necessary intent at and before the time of the

killing and that the State proved each and every element of first degree murder beyond a reasonable doubt. Petitioner's explanation to the first police officer he spoke with is at odds with his story of absolute innocence. Petitioner's numerous inconsistent statements to other officers, in addition to his testimony at trial, obviously had an effect on his credibility in front of the jury.

The state court's decision was not based on an unreasonable determination of the facts. Nor was the state court's decision contrary to or an unreasonable application of clearly established federal law, *Jackson v. Virginia*, 443 U.S. 307 (1979). The evidence does not preponderate in favor of Petitioner's innocence and against his guilt. Viewing the evidence in a light most favorable to the prosecution, the Court concludes that a rational jury could have found Petitioner guilty of first degree murder. The evidence was sufficient to support Petitioner's conviction for either first degree murder or first degree murder on a theory of aiding and abetting first degree murder. There was sufficient and extensive evidence adduced at the trial to establish each essential element of first degree murder. Accordingly, in view of the evidence, any rational trier of fact could have found the essential elements of first degree murder beyond a reasonable doubt. The Respondent will be **GRANTED** summary judgement on the sufficiency of the evidence claim, and this claim by the Petitioner will be **DISMISSED**.

10. Denial of a Full and Fair State Post-Conviction Hearing (¶ XVII)

Petitioner claims he was denied a full and fair state post-conviction hearing. This claim is confusingly pled because Petitioner first discusses the requirements of post-conviction counsel's performance, but does not appear to be raising a claim alleging ineffective assistance of post-conviction counsel. In any event, a claim of ineffective assistance of post-conviction counsel is not a cognizable habeas claim.[47]

Next, Petitioner argues he was denied adequate funding for investigative and expert services which resulted in a denial of an adequate opportunity to investigate and present his claims. Specifically, according to Petitioner, he was denied funds for investigative assistance, and he was not provided adequate funds for a mental health evaluation. The record shows the state post-conviction court awarded $4,122.66 to Dr. Engum for his services to Petitioner [Addendum No. 23, p. 264]. The state court denied funds for investigative experts because it did not find that Petitioner had demonstrated a substantial need requiring this assistance and Petitioner failed to

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[47] "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Moreover, Prisoners have no constitutional right to counsel when mounting collateral attacks upon their convictions, and the equal protection guarantee of the Fourteenth Amendment does not require the appointment of an attorney under these circumstances. *Pennsylvania v. Finley*, 481 U.S. 551, 555-56 (1987).

explain why the investigative work could not have been done by the attorneys.

Respondent contends Petitioner's claim must be dismissed because it fails to raise a constitutional challenge with respect to his custody. In *Kirby v. Dutton*, 794 F.2d 245, 247 (6th Cir. 1986), the Sixth Circuit held that relief may not be granted to a habeas petitioner for alleged deficiencies in a state post-conviction proceeding because such claims relate to a state civil matter, not the custody of a defendant. In addition, Petitioner seeks to revisit the Tennessee state court determination that he failed to comply with Tennessee law regarding his burden to show that a substantial need existed requiring assistance of experts before the State would pay for the expert. As previously discussed, state courts are the final authority on state law and federal courts must accept a state court's interpretation of its rules. Petitioner is complaining about the state post-conviction's court decision to deny him certain expert services which are allowed under TENN. CODE ANN. § 40-14-207(b) and *Owens v. State*, 908 S.W.2d 923 (Tenn. 1995). Therefore, even if Petitioner can demonstrate that some error occurred during the state post-conviction proceedings, the claim is not cognizable on federal habeas review. *See Alley v. Bell*, 307 F.3d 380, 386-87 (6th Cir. 2002), *cert. denied*, 124 S. Ct. 99 (2003).

However, assuming for the purpose of discussion that this claim is cognizable on federal habeas review, Petitioner is not entitled to any relief on this claim because he has failed to demonstrate he did not receive a full and fair hearing during his state

post-conviction proceedings. Petitioner was given an opportunity in state court to present proof and argument on the his petition for post-conviction relief, which he did.

The Court will not review the fairly lengthy procedural history of his *ex parte* hearing, except to say Petitioner was granted an *ex parte* hearing during his state post-conviction proceedings. In *Owens v. State*, 908 S.W.2d at 928-29, the Tennessee Supreme Court determined that TENN. CODE ANN. § 40-14-207(b)[48] applies to capital post-conviction cases, which means that under appropriate circumstances, an indigent petitioner in a post-conviction capital case will be entitled to a *ex parte* hearing on a motion for expert or investigative services. *Id.* at 929. "To obtain an *ex parte* hearing, a capital post-conviction petitioner must submit a

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[48] TENN. CODE ANN. § 40-14-207(b) states:

> In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, such court in an *ex parte* hearing may, in its discretion, determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If such determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the reimbursement of reasonable and necessary expenses by the administrative director of the courts as authorized by this part, and rules promulgated thereunder by the supreme court.

written motion to the trial court, alleging why under the particular facts and circumstances of the case, investigative or expert services are necessary to ensure the protection of the petitioner's constitutional rights. A bare allegation that support services are needed is not sufficient." *Owens v. State*, 908 S.W.2d at 928. "The trial court should grant the motion if, at the hearing, the petitioner demonstrates that investigative or expert services are necessary to ensure the protection of the petitioner's constitutional rights." *Id.* at 928. "Specifically, a [post-conviction] petitioner must demonstrate by specific factual proof that the services of an expert or an investigator are necessary to establish a ground for post-conviction relief, and that the petitioner is unable to establish that ground for post-conviction relief by other available evidence." *Id.* The trial court is vested with discretion to determine if investigative or expert services are necessary to protect the petitioner's constitutional rights. *Id.* at 929.

During Petitioner's *ex parte* hearing, the state court was told that the mitigation consisted of seven or eight character witnesses and that investigators were needed to probe Petitioner's background so that post-conviction counsel could show what trial counsel should have introduced as mitigation proof. Ronald L. Lax, a licensed private investigator that Petitioner's counsel was proposing to hire, submitted an affidavit explaining the purpose of an investigator and his plan to investigate the backgrounds of Petitioner and Martin; review all statements made by Petitioner, Martin, and others; review documents; review the files of Petitioner's trial counsel and of the

previous investigator; compile this information in a timeline; and provide the results of his investigation to counsel [Addendum 22, Appendix E].

Also contained in the record is the affidavit of Glori J. Shettles, a licensed private investigator who apparently was also a mitigation specialist. Ms. Shettles would have assisted the attorney by conducting a thorough social history investigation; identifying factors in the client's background or situation that require expert evaluations; assist in locating appropriate experts; providing background materials and information to experts; and consulting with the attorney.

Although Petitioner fails to direct the Court to the trial court's order regarding his *ex parte* hearing, he did raise a similar claim in his state post-conviction appeal and the appellate court found that Petitioner's motion and attached affidavits failed to explain why the investigative work could not have been done by the attorneys and must have been done by the investigators. Accordingly, the appellate court determined Petitioner failed to demonstrate why these professional investigative services were required. In addition, the court found no prejudice regarding the allegations of the State's participation in the *ex parte* hearing.[49]

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[49] There was some confusion regarding what the court actually ordered, but the end result was that the prosecutors received the motion and supporting affidavits requesting an *ex parte* hearing to request funds for expert services. The prosecutor participated in the hearing. Although Petitioner makes general allegations that the State gained an unfair advantage by

After an extensive review of the trial court proceedings and the post-conviction proceedings, this Court agrees with the state appellate court's decision. As the appellate court observed, "[j]ust because a particular service might be of some benefit does not mean that it is constitutionally required." *West v. State*, 1998 WL 309090, at *11 (UNPUBLISHED) (Tenn. Crim. App. 1998). In addition, it appears that counsel would have needed to review the files of Petitioner's trial counsel, all statements made by Petitioner, Martin, and other pertinent witnesses, and identify and interview necessary witnesses to prepare for the state post-conviction hearing. That being the case, in addition to the fact that counsel could have done the investigative work which they were requesting funds to have others perform, counsel would have then duplicated the work of the investigator and mitigation specialist when counsel prepared for the post-conviction hearing. The Court's review of the record of the post-conviction proceedings does not demonstrate that Petitioner was denied a full and fair state post-conviction hearing.[50]

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obtaining this material and shared it with witnesses, the Court does not find that Petitioner has made any specific allegations or shown any actual prejudice.

[50] Post-conviction counsel's affidavit does not explain why he could not conduct the investigation. In paragraph 16 counsel discusses records that would need to be obtained by subpoenas or court orders, which attorneys can do. In paragraph 17 counsel discusses interviewing witnesses with a sensitivity to mental state issues. Counsel had Dr. Engum to assist him with those interviews, if necessary. Petitioner's reference to Ms.

Accordingly, the state court's decision that Petitioner did not demonstrate that the services of the investigators were necessary to establish a ground for post-conviction relief was not contrary to or an unreasonable application of federal law,[51] or an unreasonable determination of the facts. Consequently, Petitioner's claim that he was denied a full and fair state post-conviction hearing will be **DISMISSED**. Respondent will be **GRANTED** summary judgment because the Petitioner's claim is not cognizable on federal habeas review, and, in the alternative, the state court decision was not contrary to or an unreasonable application of federal law, nor an unreasonable determination of the facts.

Gossett's (one of his state post-conviction attorneys) affidavit is not relevant because this affidavit was not before the trial court when it was ruling on the *ex parte* motion. In addition, the Court notes, Ms. Gossett did not attempt to obtain the records until just a few weeks prior to the post-conviction hearing.

[51] Contrary to Petitioner's contention that the State's "substantial need" requirement is contrary to or an unreasonable application of *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that the state must provide an indigent defendant with competent psychiatric assistance to conduct an appropriate examination to enable the indigent defendant to meaningfully participate at his trial regardless of his finances), there is no constitutional requirement under Supreme Court precedent that states must provide expert services to post-conviction petitioners. Unlike *Ake*, in which defendant was preparing for trial, Petitioner had already been convicted and was preparing his state collateral attack.

11. Cumulative Error Claim (Amd. Pet. ¶ XXII)

Petitioner's last assertion is that the cumulative effect of the seven errors recognized by the state court and those enumerated within his amended habeas petition acted to deprive him of a fair trial. The only portion of this claim that was raised in state court is the claim that the cumulative effect of the seven errors recognized by the state court acted to deprive him of his constitutional right to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

After the denial of his direct appeal, Petitioner filed a petition to rehear alleging that "The Combination of Errors Recognized By This Court Amounted To Prejudicial Error" [Addendum No. 20(a), Claim No. IV]. Petitioner raised seven claims of errors in his petition to rehear asserting that the combination of the seven errors deprived him of a fair trial. In this instant habeas petition, Petitioner raises the same seven errors raised in state court as well as every other claim that he has raised in his federal petition. The only claim properly before this Court is his cumulative error claim to the extent that he has raised the identical seven errors he raised in his state petition to rehear.[52]

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[52] Petitioner has only exhausted the procedurally defaulted on the portion of his claim referring to the errors enumerated within this amended habeas petition, and thus he is not entitled to any habeas relief on that portion of the claim. *Coleman v. Thompson*, 501 U.S. at 735 n.l. Petitioner has not

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone . . . may cumulatively produce a trial setting that is fundamentally unfair." *United States v. Hernandez*, 227 F.3d 686, 697 (6th Cir. 2000) (citing *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983)) (internal quotation marks omitted). However, the standard the Supreme Court has directed federal courts to use on collateral review is whether the trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Therefore, to obtain relief, Petitioner must present an accumulation of non-reversible errors that must lead this Court to the firm belief that an injustice has been done resulting in a "fundamentally unfair" proceeding. However, the mere addition of numerous insubstantial complaints will not lead to a successful "cumulative error" argument. *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000) (defendant cannot simply add individual meritless claims to show cumulative error).

In analyzing the case for cumulative error, a court evaluates the effect of matters determined to be error, not the cumulative effect of non-errors. *Lundy v. Campbell*, 888 F.2d 467, 481 (6th Cir.

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demonstrated cause for the default and actual prejudice as a result of the alleged violation, nor has he demonstrated a fundamental miscarriage of justice will result if the Court does not consider this claim. Consequently, Petitioner is not entitled to a review on the part of his claim that is procedurally defaulted. *Id.*

1989), *cert. denied*, 495 U.S. 950 (1990). In addition, the court may only consider the errors committed in the state trial court, and only errors that have not been procedurally barred from habeas corpus review. *Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992 (en banc), *cert. denied*, 508 U.S. 960 (1993).

To the extent this claim was initially raised in state court, the Tennessee Supreme Court determined the total errors in the record were harmless beyond a reasonable doubt. In addition, the Tennessee court observed that Petitioner's classification of some of the seven items as errors "were merely violations of the 'better practice' rules" [Addendum 20 (b)]. The accumulation of these alleged non-reversible errors do not lead this federal district court to the firm belief that an injustice has been done resulting in a "fundamentally unfair" proceeding. Petitioner has failed to demonstrate that, based upon cumulative error, that the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair or his sentence and conviction unreliable. The Court concludes that Petitioner has not demonstrated that any errors made by the state courts deprived him of due process. There is no cumulative error made out by a combination of the various unavailing arguments raised in this case.

Petitioner has failed to demonstrate that the state court's decision was contrary to, or involved an unreasonable application of, established federal law as determined by the United States Supreme Court, or involved an unreasonable determination of the facts in light of the evidence presented in the state

court proceeding. Accordingly, the Court will **GRANT** summary judgment on this cumulative error claim. Therefore, Petitioner's cumulative error claim will be **DISMISSED**.

B. Claims Barred By 28 U.S.C. § 2244(d)[53] (Amd. Pet. ¶ I.A, XIV.A, XIX, AND XX)

Petitioner's amended petition [Doc. 111] contains four claims that were not raised in his original habeas petition [Doc. 40].[54] Petitioner's state post-

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[53] This statute provides for a one-year period of limitation to file an application for a writ of habeas corpus by a person in state custody pursuant to a judgment of a state court.

[54] The following claims, found in Petitioner's amended petition, were not included in his original petition:

I.A. The trial court erroneously denied petitioner funding for a mental health expert in violation of his Sixth, Eighth, and Fourteenth Amendment rights, and the United States Supreme Court's holding in *Ake v. Oklahoma*, 470 U.S. 68 . . . (1985).

XIV.A. Petitioner's death sentence violates the Eighth Amendment and the United States Supreme Court's holdings in *Enmund v. Florida*, 458 U.S. 782 . . . (1982); *Cabana v. Bullock*, 474 U.S. 376 . . . (1986); and *Tison v. Arizona*, 481 U.S. 137 . . . (1987); because the evidence failed to show that petitioner directly participated in the murders.

XIX. Death by lethal injection constitutes cruel and unusual punishment in violation of the Eighth Amendment.

conviction proceedings concluded on June 7, 2000, when the Tennessee Supreme Court entered its order denying his petition for rehearing. Petitioner filed his original habeas petition on June 7, 2001 [Doc. 40]. The AEDPA statute of limitations expired on June 8, 2001. Because Petitioner filed his amended petition on February 25, 2002, these new claims are barred by 28 U.S.C. § 2244(d). However, if these claims relate back to Petitioner's original petition, then they will be allowed. *See* FED. R. CIV. P. 15(c).

"Several elements may be considered in determining whether to permit an amendment. Undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which may affect the decision." *Coe v. Bell*, 161 F.3d 320, 341 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999). The Court will address each new claim separately below.

1. Erroneous Denial of Funding for Mental Health Expert (Amd. Pet.) ¶ I.A.)

Petitioner claims the trial court abused its discretion and prejudiced his defense when it denied his motion for an expert to assist him in preparing his duress defense. Prior to trial, Petitioner filed a

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XX. Death by electrocution constitutes cruel and unusual punishment in violation of the Eighth Amendment.

motion pursuant to TENN. CODE ANN. § 40-14-207(b)55[55] requesting the court to authorize the hiring of a psychologist at state expense. Petitioner had told investigators that he was forced by his co-defendant to engage in intercourse with one of the victims, so the funds were requested to hire an expert to testify as to the viability of a duress defense. Petitioner avers that the state court decision upholding the denial of expert funds is contrary to, or an unreasonable application of, *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985), or is based upon an unreasonable determination of facts.

Respondent contends this claim is new because Petitioner did not raise the claim of denial of funding for a mental health expert in his original petition. Respondent argues that the only *Ake* claim raised in the original petition related to his post-conviction proceedings [Doc. 57, pp. 16-21]. Respondent contends this new claim, first raised in the amended petition filed on February 25, 2002, is time-barred under the ADEPA statute of limitations, 28 U.S.C. § 2244(d), which expired on June 8, 2001.

In the scheduling order the Court ordered that any amendments to the petition were to be filed on or before January 7, 2002 [Doc. 29]. Magistrate Judge Robert P. Murrian entered an order granting Petitioner's motion for an extension of time to file an

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55 This statute authorizes a court in a capital case to approve certain expert services at state expense if the court determines, in its discretion, that expert, investigative, or other expert services are necessary to protect the constitutional rights of an indigent defendant.

amended petition on or before February 25, 2002 [Doc. 103]. Respondent did not object to Petitioner's request for a thirty day extension of time to file an amended petition but specifically stated that by such assent to the extension, it did not waive any defense including the statute of limitations with respect to any claim presented in the amended petition [Doc. 93].

The parties do not contest that Petitioner filed his original petition for habeas relief pursuant to § 2254 within the applicable statute of limitations. The statute of limitations began to run when the Tennessee Supreme Court denied Petitioner's petition for rehearing on June 7, 2000. Petitioner had until June 7, 2001, to file his petition for a writ of habeas corpus pursuant to § 2254. Because Petitioner filed his original petition within the one-year period on June 7, 2001, his original petition was timely.

Petitioner then filed an amended petition on February 25, 2002. Pursuant to 28 U.S.C. § 2242, habeas corpus applications "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." In this case, Petitioner is attempting to amend his petition after the limitations period for filing his habeas petition has expired. Rule 15 of the FEDERAL RULES OF CIVIL PROCEDURE, governs amendments in civil actions. Subsection (c) of Rule 15 governs motions to amend where the statute of limitations for the underlying cause of action has already run. That section provides in relevant part: "An amendment of a pleading relates back to the date of the original

pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading[.]" FED. R. CIV. P. 15(c).

Therefore, Petitioner will only be allowed to amend his petition with a new claim or theory if the new claim or theory relates back to the claims and theories included in his original timely filed habeas petition. *See Anderson v. United States*, 2002 WL 857742 (UNPUBLISHED) (6th Cir. May 3, 2002) (§ 2255 case); *Oleson v. United States*, 2001 WL 1631828 (UNPUBLISHED) (6th Cir. Dec. 14, 2001) (§ 2255 case).[56] This Court must determine whether the amended claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *See* FED. R. CIV. P. 15(c).

The Sixth Circuit has observed that "the thrust of Rule 15 is to reinforce the principle that cases 'should be tried on their merits rather than the technicalities of pleadings.'" *Miller v. American Heavy Lift Shipping*, 231 F.3d 242 (6th Cir. 2000), *quoting Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986). Thus, a party may add a new legal theory in an amended pleading as long as it arises

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[56] The Supreme Court has observed that "§ 2255 was intended to mirror § 2254 in operative effect." *Reed v. Farley*, 512 U.S. 339, 353-54 (1994), *quoting Davis v. United States*, 417 U.S. 333 (1974).

out of the same transaction or occurrence. *See Miller v. American Heavy Lift Shipping*, 231 F.3d at 248. "When the nature of the amended claim supports specifically the original claim, the facts they alleged implicate the original claim, even if the original claim contained insufficient facts to support it. One purpose of an amended claim is to fill in facts missing from the original claim." *Dean v. United States*, 278 F.3d 1218, 1222 (11th Cir. 2002).

In his original habeas petition, Petitioner claimed he was denied "a fair defense when the trial court excluded highly relevant and probative evidence that corroborated the defense at trial[.] . . . The exclusion of this evidence is a clear violation of *Chambers v. Mississippi*, 410 U.S. 284 (1973)." [Doc. 40, p. 10]. The excluded evidence to which Petitioner was referring was specific evidence from specific witnesses. In his amended complaint he attempts to intertwine his claim of denial of a fair defense with the new claim that he was denied funding for a mental health expert to testify as to the viability of his defense. In effect, Petitioner is adding a new claim of denial of funding and attempting to include it in his claim that evidence was excluded, in an attempt to excuse his tardiness in raising this claim after the statute of limitations has expired. This claim is really a claim of denial of funding for experts, not a denial of a fair defense. Therefore, Petitioner's claim that he was denied funding does not arise out of the conduct, transaction, or occurrence set forth in this original petition, *i.e.*, that he was denied a defense because certain evidence was excluded. Accordingly, under the law as

described above, the Court finds that Petitioner's claim that he was denied funding for a mental health expert to testify as to the viability of his defense fails to relate back to his claim that he was denied a defense due to the exclusion of evidence, as raised in his original petition.

In addition to determining whether the claim relates back pursuant to FED. R. CIV. P. 15(c)(2), the Court must look to other factors as well. "'Undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which may affect the decision.'" *Miller v. America Heavy Lift Shipping*, 231 F.3d at 250, *quoting Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 484 (6th Cir. 1973). When determining whether an amendment should be granted, the most critical of these factors are notice and substantial prejudice to the opposing party. *Miller*, 231 F.3d at 250.

Petitioner claims the State has been on notice for years that he has challenged the constitutionally of his convictions and sentences which resulted from a trial where he allegedly was denied the basic tools for a defense. In state court his claim was based on state law arguments. Petitioner raised the claim that the state trial court abused its discretion when it denied his motion to hire a psychologist as a issue of state law and not constitutional law on direct appeal. The state trial court denied Petitioner's motion for funds which was filed pursuant to TENN. CODE. ANN. § 40-14-207(b). The statute permits state trial courts

in capital cases, when in its discretion it determines expert services are necessary, to authorize the necessary services at state expense. Petitioner argues the state trial court abused this discretion.

"[T]he habeas petitioner must present his claim to the state courts as a federal constitutional issue - - not merely as an issue arising under state law." *Prather v. Rees*, 822 F.2d 1418, 1420 (6th Cir. 1987), *quoting Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984). This claim was raised in state court by Petitioner as a state law question, and therefore, the federal constitutional violation allegedly caused by the state court's disposition of the motion was not exhausted. *Id.* at 1420; *Dougan v. Ponte*, 727 F.2d 199 (1st Cir. 1984). Petitioner has procedurally defaulted on this issue and he has failed to show cause and prejudice for his default. Therefore, allowing Petitioner to amend his habeas petition with a claim that he procedurally defaulted would be futile. Accordingly, the Petitioner's claim that he was denied funding for an expert to assist in presenting his duress defense will be **DISMISSED** because it is a new claim which consequently is time-barred by 28 U.S.C. § 2244(d) and barred pursuant to FEDERAL RULE OF CIVIL PROCEDURE 15(c) because it fails to relate back to the original petition. Although there has been no demonstration of substantial prejudice to the Respondent, it would be futile to allow the amendment since this Court is prohibited from addressing this constitutional claim due to Petitioner's procedural default by not raising this constitutional claim in state court..

Moreover, even if the claim was not procedurally defaulted, Petitioner would not be entitled to any habeas relief on this claim. The Tennessee Supreme Court determined that the issue of whether these crimes were committed under duress, *i.e.*, the threat of death or injury from a deadly weapon, was a pure fact issue upon which no expert testimony would be admissible. *See State v. West*, 767 S.W.2d 387, 400 (Tenn. 1989). Consequently, even if the state court had approved the funding, it appears that the evidence would not have been admissible. Correspondingly, since Petitioner has not demonstrated that the state court decision was contrary to or an unreasonable application of established Federal law, he would not be entitled to habeas relief even if the claim was properly before this Court.

2. Death Sentence Violates the Eighth Amendment (Amd. Pet.) ¶ XIV.A.)

In his original petition Petitioner made the following claim:

> In violation of the Sixth and Eighth amendments, and the Due Process and Equal Protection under the Fourteenth Amendment, the death sentence imposed was arbitrary because Martin received two life sentences, while Stephen West received two death sentences. There is neither any rational basis nor heightened reason to allow the arbitrary and disparate treatment of Stephen West vis-a-vis his co-defendant Martin. *See*

Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 388 (2000).

[Doc. 40, p. 44, ¶ 49].

Amended petition claim fourteen section A is confusingly pled. First, Petitioner claims his death sentences were arbitrarily imposed because his co-defendant, who had a prior relationship with the victims and was the mastermind behind the crimes, in addition to being the actual killer, received sentences of life imprisonment. Second, Petitioner contends that based on the instruction given to the jury as outlined in TENN. CODE ANN. § 39-2-203(i)[57] the jury could have sentenced him to death without finding he killed or intended to kill the victims in violation of *Enmund v. Florida*, 458 U.S. 782 (1982). Thus, argues Petitioner, his death sentence violates the Eighth Amendment because there was no proof that Petitioner killed or attempted to kill the victims, and because the jury instructions permitted the jury to sentence him to die without finding he killed or intended to kill the victims.

Respondent contends this is a new claim which does not relate back to Petitioner's original petition. Consequently, argues Respondent, this claim is time-barred under 28 U.S.C § 2244(d).

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[57] "The murder was committed while the defendant was engaged in committing or was an accomplice in the commission of, or was attempting to commit[,] or was fleeing after committing or attempting to commit, any first degree murder, rape, larceny, or kidnaping." (Addendum No. 14, p. 11).

The claim, as identified in his original petition, was based on the proposition that Petitioner's death sentence was arbitrary because his co-defendant received two life sentences. The claim Petitioner makes in his amended petition is a two-part claim. Petitioner first asserts that the trial court gave a jury instruction which allowed the jury to sentence him to death without finding he killed or intended to kill the victims, which he claims violates the holdings in several United States Supreme Court cases. The second part of his claim, *i.e.*, part B, (that Petitioner's sentence is disproportional to Martin's sentence) will be addressed later in this memorandum at Section C. 4.

Turning to part A of this claim, the Court makes several observations. First, the Court observes that Tennessee law prohibits Martin from being sentenced to death because he was under the age of eighteen when the crimes were committed. Second, the Court observes that Petitioner's claim that there was no physical evidence introduced at trial to connect him with the murders is simply not true. Finally, the Court observes that physical evidence is not necessary to convict a defendant of a crime, and circumstantial evidence alone is sufficient to sustain a criminal conviction. *United States v. Avery*, 128 F.3d 966, 971 (6th Cir. 1997) (citing *United States v. Townsend*, 796 F.2d 158, 161 (6th Cir. 1986) ("Circumstantial evidence on its own can sustain a jury's verdict, and such circumstantial evidence need not remove every reasonable possibility of doubt."); *United States v. Ledezma*, 26 F.3d 636, 641 (6th

Cir.), *cert. denied*, 513 U.S. 942 (1994); *United States v. Cantrell*, 278 F.3d 543 (6th Cir. 2001).

At trial there was evidence introduced to support Petitioner's conviction. The testimony of Dr. Blake regarding the torture wounds on both the female victims to keep them under control and his opinion that two people were involved in committing this crime support Petitioner's conviction. The circumstantial evidence is sufficient to support the theory that Petitioner and Martin together overpowered the women; that Petitioner raped the young female; and that both defendants participated or aided and abetted each other in the stabbing deaths of the victims. Petitioner's claim that he was a victim is not credible when evaluated against the evidence that the victims had defensive wounds and he had none; the victims had their hands tied behind them and he did not; the victims were brutally stabbed and he was not; and by his own testimony he had weapons in his hands but never challenged Martin. Therefore, in addition to the fact that this claim does not relate back to Petitioner's original habeas petition, the Court will also **DENY** the amendment on the grounds of futility. It would be futile to grant the amendment because Petitioner would not be entitled to any habeas relief because the circumstantial evidence, along with the physical evidence, supports the conviction on the theory that both defendants actively participated and aided and abetted each other in the commission of the crimes. In addition, the difference in sentence is a result of Tennessee law which prohibits the execution of minors. Therefore, based on the facts and the law,

Petitioner would not be entitled to habeas relief on his claim that his sentences were arbitrarily imposed.

The portion of Petitioner's claim regarding the aggravating circumstance jury instruction is indecipherable. Intent is not relevant at sentencing. Intent was previously determined at the guilt phase, so the argument that "based on these instructions the jury could have found Mr. West guilty of first degree murder and sentenced him to die without finding that he killed or intended to kill the victims[,]" does not make sense inasmuch as this instruction was given during sentencing, after Petitioner was already found guilty of the crimes. When the jury convicted Petitioner of the crimes, they necessarily found that he possessed the required intent. Thus, even if this claim did relate back to the original petition, which the Court finds it does not, Petitioner would not be entitled to any habeas relief on his claim that his sentences are arbitrary because the jury could have sentenced him to death without finding he killed or intended to kill the victims in violation of the Sixth and Eighth Amendments because he was convicted of the murders prior to the trial court giving the jury instruction he now challenges.

However, since this is a new claim that does not relate back to Petitioner's original petition, it is time-barred under 28 U.S.C. § 2244(d). Accordingly, Petitioner's claim that his sentences are arbitrary because the jury could have sentenced him to death without finding he killed or intended to kill the victims in violation of the Sixth and Eighth

Amendments will be **DISMISSED** as time-barred since it does not relate back to the original petition. 28 U.S.C. § 2244(d); FED. R. CIV. P. 15(c).

3. Death by Lethal Injection Violates the Eighth Amendment (Amd. Pet.) ¶ XIX)

Petitioner contends that death by lethal injection constitutes cruel and unusual punishment in violation of the Eighth Amendment. Respondent contends this claim is time-barred by 28 U.S.C. § 2244(d), the AEDPA statute of limitations. Respondent further argues this is a new claim and does not relate back to Petitioner's original petition. *See* FED. R. CIV. P. 15(c).

Petitioner asserts this claim relates back to his original petition wherein he requested the Court to find his convictions and sentences for first degree murder unconstitutional and invalid. In addition, in his original petition, he claimed the death penalty was cruel and unusual punishment as a result of the length of time he has been incarcerated under the sentence of death [Doc. 40, p. 46]. However, Petitioner has failed to direct the Court to any place in the record where he previously raised that death by lethal injection violates the Eighth Amendment's prohibition of cruel and unusual punishment.

Petitioner is not entitled to habeas relief on this claim for three reasons. First, the Court finds this is a new claim and does not relate back to this original petition and, therefore, it is time-barred under 28 U.S.C. § 2244(d). Second, Petitioner did not raise this claim in the state courts; thus, he has procedurally

defaulted this claim.[58] Third, the record indicates Petitioner lacks standing to bring this claim because he is not sentenced to die by lethal injection. According to the record, Petitioner has declared his preferred method of execution as electrocution over the State's default method of execution by lethal injection [Doc. 5, Affidavit of Keith Caruso, M.D., ¶ 20; Doc. 10]. Consequently, even if this claim did

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[58] The Tennessee Legislature amended the statutory law to allow a defendant who was sentenced to death before January 1, 1999, to sign a written waiver and elect to be executed by lethal injection. This law became effective May 18, 1998. TENN. CODE ANN. § 40-23-114(c). In 2000 the legislature again amended TENN. CODE ANN. § 40-23-114(c) and provided for lethal injection as the default manner of execution in all cases in which a defendant had been sentenced to death. This amendment became effective on March 30, 2000. However, a defendant may waive lethal injection and elect electrocution.

Petitioner should have initially raised this claim in state court. The Court of Criminal Appeals rendered its decision on June 12, 1998, and the Tennessee Supreme Court rendered its decision on May 12, 2000. The record does not indicate that Petitioner attempted to raise this claim through a motion to consider post-judgment facts under Rule 14 of the *Tennessee Rules of Appellate Procedure*. Consequently, he failed to fairly present this claim to the state courts, which has resulted in an unexcused procedural default. *See State v. Suttles*, 30 S.W.3d 252, 264 (Tenn. 2000) (On direct review the defendant asserted that death by electrocution or by any means was unconstitutional. In passing, he mentioned that execution by lethal injection was cruel and unusual punishment. Since lethal injection was not a method of execution in Tennessee at the time the defendant was tried and convicted, the Tennessee Supreme Court determined he could raise the issue in a post-conviction proceeding.) Thus, it appears that Petitioner should have at least attempted to raise this claim in state court.

relate back to his original habeas petition, Petitioner has failed to state a claim since he has apparently chosen death by electrocution.

Accordingly, Petitioner's claim that death by lethal injection constitutes cruel and unusual punishment in violation of the Eighth Amendment will be **DISMISSED** as time-barred, and in the alternative, as procedurally defaulted, and for lack of standing. The Respondent will be **GRANTED** summary judgment on this claim. 28 U.S.C. § 2244(d); FED. R. CIV. P. 15(c).

4. Death by Electrocution Violates the Eighth Amendment (Amd. Pet.) ¶ XX)

Petitioner claims he is sentenced to death by electrocution which constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Respondent correctly observes that Petitioner failed to raise this claim in his original petition and that this claim does not relate back. *See* FED. R. CIV. P. 15(c). In addition, Petitioner procedurally defaulted this claim.[59] Moreover, the United States

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[59] The record reveals Petitioner raised this claim in his state post conviction petition. Petitioner claimed death by electrocution was cruel and unusual punishment. The state post-conviction court deemed it waived and otherwise without merit [Addendum No. 23, p. 284]. Thus, the state court declined to reach the merits because of Petitioner's failure to comply with the requirements of a Tennessee procedural rule. In addition, Petitioner did not raise the claim to the Tennessee appellate court and thus failed to exhaust this claim in state court. Petitioner has not demonstrated cause and prejudice to excuse his procedural default. Accordingly, Petitioner's claim

Supreme Court has stated that a defendant who elects a certain means of death, such as electrocution, waives his constitutional challenge to the manner of executing the sentence. *Stewart v. LaGrand*, 526 U.S. 115 (1999).

Accordingly, Petitioner's claim that death by electrocution is cruel and unusual punishment will be **DISMISSED** as time-barred under 28 U.S.C. § 2254(d) because it does not relate back to the claims in Petitioner's original petition. Alternatively, Petitioner's claim will be **DISMISSED** as procedurally defaulted and waived, because he has waived any constitutional challenge to electrocution since he chose this method of execution over Tennessee's default method, lethal injection. Respondent will be **GRANTED** summary judgment on this claim.

C. Unripe Claim

1. Incompetent to be Executed (Amd. Pet. ¶ XV)

Petitioner's fifteenth claim avers his execution would violate the Eighth and Fourteenth Amendments because he "has a long-standing history of mental illness which, under extreme stress, such as his own execution, will cause him to have a psychotic break such that he will be incompetent to be executed" [Doc. 111]. Respondent argues this claim is not ripe for review which

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that death by electrocution is unconstitutional will alternatively be **DISMISSED** because of his unexcused procedural default.

Petitioner concedes in his response to the Respondent's motion for summary judgment.

Petitioner has failed to present any factual support for his incompetence/mental illness claim, even though Rule 2(c) of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS requires a habeas petitioner to "specify all the grounds for relief which are available" and "set forth facts to the claim asserted that is important." *See* Rule 2 of the RULES GOVERNING § 2254 CASES IN THE UNITED STATES DISTRICT COURTS (Advisory Committee Note to 1976 Amendment to Rule 2). A factual basis is especially important to claims of this nature. *See, e.g., Van Tran v. State*, 6 S.W.3d 257, 267 (Tenn. 1999), *cert. denied*, 529 U.S. 1091 (2000) (requiring a petitioner raising an incompetence/mental retardation claim to supply a factual basis, affidavits, records, and other materials to raise genuine disputed issues regarding competency).

Despite the lack of factual support herein, the Supreme Court has determined an incompetence/mental retardation claim does not become ripe until the execution is imminent. *Stewart v. Martinex-Villareal*, 523 US. 637, 645 (1998). At this time, an imminent execution date has not been scheduled. Once an execution date is imminent, the state courts must first be given the opportunity to consider this claim. *See id.*; *Franklin v. Francis*, 168 F.3d 261, 262 (6th Cir.), *cert. denied*, 525 U.S. 1132

(1999); *Van Tran*, 6 S.W.3d at 267;[60] *see also Coe*, 209 F.3d 815. Accordingly, Petitioner's claim he cannot be executed due to his possible incompetence or mental illness is prematurely raised in this proceeding and will be **DISMISSED WITHOUT PREJUDICE**.

D. Procedurally Defaulted Claims

Numerous claims raised by Petitioner are procedurally defaulted and barred from habeas review. As previously stated, Petitioner may not challenge the constitutionality of his conviction by seeking habeas relief under 28 U.S.C. § 2254 unless he has exhausted his available state court remedies. *See Coleman v. Thompson*, 501 U.S. 722, 731(1991). To exhaust each claim, Petitioner must have presented each claim to the State's highest court. Petitioner may not circumvent the exhaustion requirement by failing to follow state procedural rules. *See Gray v Netherland*, 518 U.S. 152, 162 (1996); *Combs v. Coyle*, 205 F.3d 269, 274 (6th Cir.),

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[60] In *Van Tran*, the Tennessee Supreme Court clarified the procedure by which a prisoner who has been sentenced to death may raise the issue of present mental competency to be executed. The issue of competency to be executed is generally ripe for determination only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner's conviction and sentence and the Tennessee Supreme Court has set an execution date upon motion of the state Attorney General. The prisoner should raise the issue of competency to be executed in the first instance in the Tennessee Supreme Court when filing a written response to the motion of the state Attorney General to set an execution date.

cert. denied, 531 U.S. 1035 (2000). "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Combs*, 205 F.3d at 274, *quoting Coleman v. Thompson*, 501 U.S. at 750.

This Court has applied the four-part *Maupin* analysis to the claims the State argues are defaulted by the Petitioner's failure to observe a state procedural rule. See *White v. Schotten*, 201 F.3d.743, 749 (6th Cir.), *cert. denied*, 531 U.S. 940 (2000). Under *Maupin*, this Court must first "determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). The Court then must decide whether the state courts actually enforced the state procedural sanction. *Id.* Next the Court must decide whether the state procedural rule is an "adequate and independent" state ground on which the State can rely to foreclose review of a federal constitutional claim. *Id.* The last step in this analysis requires the Court, after determining that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, to determine whether the Petitioner has demonstrated cause for his failure to follow the procedural rule and

show he was actually prejudiced by the alleged constitutional error.

In order for a procedural rule to be an adequate and independent state ground, it must be applied "regularly and consistently." *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989); *accord Mapes v. Coyle*, 171 F.3d 408, 421 (6th Cir.), *cert. denied*, 528 U.S. 946 (1999). The claims rejected by the state courts on the state procedural rules found at TENN. CODE ANN. § 40-30-111 and § 40-30-112 (since repealed)[61] are adequate and independent state grounds. Under Tennessee law in effect during Petitioner's state court proceedings, grounds for relief that had been previously determined or waived were not cognizable in a state post-conviction action. TENN. CODE ANN. § 40-30-111. The relevant terms were defined as follows:

> (a) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> (b)(1) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a

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[61] This statute was repealed in 1995. The current statute is found at TENN. CODE ANN. § 37-1-312 but does not contain part (2). Petitioner's state court proceedings were controlled by this statute which was not repealed until May 10, 1995. Petitioner's state post-conviction petition was filed on October 23, 1990, which was prior to this statute being repealed.

> court of competent jurisdiction in which the ground could have been presented.
>
> (2) There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

TENN. CODE ANN. § 40-30-112. A claim presented in federal court which was never actually presented in state court, but is now prohibited by a state procedural rule from state court from consideration, is considered exhausted, but procedurally barred because Petitioner has no remedy currently available in state court. *Coleman v. Thompson*, 501 U.S. at 752-53. If the state court adjudicates and rejects a claim on adequate and independent state grounds, such as a state procedural rule that precludes adjudicating the claim on the merits, then Petitioner is barred by his procedural default from seeking federal habeas review of the claim unless cause and prejudice is demonstrated for the default. *Edwards v. Carpenter*, 529 U.S. 446 (2000); *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

As previously discussed in this opinion (Section III. D), cause for a procedural default depends on some "objective factor external to the defense" that interfered with the Petitioner's efforts to comply with the procedural rule. *Coleman*, 501 U.S. at 752-53; *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Interference by officials or the reasonable unavailability of the factual or legal basis for a claim are examples of external factors which satisfy the

cause requirement. *Id.* Constitutionally ineffective assistance of counsel will also meet the cause requirement. *Id.* A petitioner meets the prejudice requirement by demonstrating the alleged violation "worked to his *actual* and substantial disadvantage." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original).

The only other way a petitioner may avoid the procedural bar and the necessity of showing cause and prejudice is by demonstrating that a fundamental miscarriage of justice will result if the court fails to consider the claim. *See Coleman*, 501 U.S. at 750. The miscarriage of justice exception requires the Petitioner to show actual, not legal, innocence. *See Smith v. Murray*, 477 U.S. 527, 537 (1986); *see also* discussion *supra* Part III.E. of this memorandum.

The claims before this Court that were procedurally barred in state court were based on an adequate and independent state ground. Petitioner has failed to establish cause for violating the procedural rules and prejudice resulting from the default. In addition, Petitioner has not demonstrated that failure to consider the claims will result in a fundamental miscarriage of justice. Consequently, Petitioner is not entitled to habeas relief on the procedurally defaulted claims in this section.

1. Martin's Confession to John Allen (Amd. Pet. ¶ I.C)

Petitioner contends that co-defendant Martin admitted to John Allen that he (Martin) had killed both victims. Petitioner claims John Allen's

testimony was excluded in violation of his constitutional rights.

Because Petitioner failed to fairly present this issue to the Tennessee Supreme Court on direct appeal or during his state post-conviction proceedings, the issue has been procedurally defaulted. Petitioner has not shown cause and prejudice to excuse his default. Accordingly, Petitioner's claim that his constitutional rights were violated when John Allen's testimony was excluded is procedurally barred and thus will be **DISMISSED**.

2. Ineffective Assistance of Counsel Due to Counsel's Conflict of Interest (Amd. Pet. ¶ III.B)

Petitioner claims his lead counsel, Mr. McConnell, was acting under an actual conflict of interest. According to Petitioner, Mr. McConnell was taking directions from Petitioner's relatives rather than Petitioner. Thus, Petitioner argues, Mr. McConnell placed his personal fiscal concerns over Petitioner's best interest. Petitioner specifically alleges that Mr. McConnell refused to investigate and present his history of abuse because Petitioner's mother threatened Mr. McConnell if he did so.

Respondent contends Petitioner procedurally defaulted this claim because he failed to raise it in the appellate court during his state post-conviction proceedings. Petitioner disagrees and claims "the majority of the facts supporting this claim were presented to the state courts[,]" and this Court should review this issue *de novo* because the state

court refused to address this issue. [Court File No. 144, pp. 69, 71].

The state court did not address this issue because Petitioner did not raise this issue. Petitioner's counsel has failed to direct the Court's attention to the location of this specific claim. The Court has reviewed the state post-conviction appellate brief and does not find this issue raised anywhere.

Although Petitioner included some of the facts supporting this claim in his state post-conviction appeal to support his claim that counsel was ineffective for failing to investigate Petitioner's background, he never raised the claim that counsel was acting under an actual conflict of interest. Therefore, Petitioner has failed to exhaust this claim in state courts. Petitioner did not raise the claim that his counsel was operating under an actual conflict of interest in the Tennessee Court of Criminal Appeals after the state trial court denied his petition for post-conviction relief. Consequently, Petitioner has procedurally defaulted his claim that counsel had an actual conflict of interest. Since he has failed to demonstrate cause and prejudice for this procedural default, this claim will be **DISMISSED**, and Respondent's motion for summary judgment on the actual conflict of interest claim will be **GRANTED**.

3. Counsel Made Statements Detrimental to Petitioner Before the Trial Court (Amd. Pet. ¶ III.C)

Petitioner claims trial counsel was constitutionally ineffective because counsel conceded

Petitioner's guilt and made highly prejudicial comments regarding him to the jury. Petitioner identified specific statements to support his claim. Respondent claims Petitioner is not entitled to any relief on this claim because he failed to exhaust his remedies. In reviewing Petitioner's response [Court File No. 144], it does not appear that he is denying he failed to exhaust his remedies on this claim.

Petitioner has procedurally defaulted his claim that counsel was ineffective when he made statements detrimental to him before the trial court because Petitioner has never allowed the state appellate court to address the issue of whether Petitioner's trial counsel was ineffective for making such statements. Petitioner has failed to allege any cause or prejudice for his failure to raise the claim that his trial counsel was ineffective for making detrimental statements to the trial court on direct appeal. Therefore, Petitioner's detrimental statement claim is procedurally barred, necessitating the **DISMISSAL** of this issue. Respondent is **GRANTED** summary judgment on the claim of detrimental statements.

4. Other Claims of Ineffective Assistance (Amd. Pet. ¶ III.D 1, 3-7, III.D.D.)

Petitioner claims trial counsel committed numerous errors which resulted in such representation falling below a reasonable standard of practice and ultimately resulted in prejudice to him. Petitioner has identified seven specific errors, six of which Respondent contends are subject to dismissal

without further consideration because Petitioner failed to exhaust any of these six claims in state court. In addition, Respondent avers the cumulative error claim is also procedurally defaulted. Respondent contends Petitioner failed to raise these claims in the Tennessee Court of Criminal Appeals after the state trial court denied his petition for post-conviction relief.

Petitioner first claims (claim III.D.1) that his trial counsel failed to exercise a peremptory challenge against a juror whose son was already seated on the jury. This claim was not raised in the state appellate court, as clearly revealed in Petitioner's appellate brief [Addendum 28].

The second (claim III.D.3) of these six unexhausted claims asserted by Petitioner is that his trial counsel were ineffective for failing to question Mr. Romines about a personal relationship between his daughter, one of the murdered victims, and co-defendant Martin. Respondent asserts that Petitioner's failure to exhaust this claim prevents this Court from addressing the claim. Petitioner does not deny he failed to exhaust this claim and his appellate brief does not reveal that he raised this issue before the state appellate court. Consequently, this claim is procedurally defaulted.

In claim III.D.4, Petitioner claims trial counsel was ineffective for failing to call co-defendant Martin as a witness so the jury could see his physical size in comparison to Petitioner's. Petitioner does not refute Respondent's contention that he failed to exhaust this claim. In addition, Petitioner's state post-

conviction appellate brief does not include this claim. Hence, this claim is procedurally defaulted.

Petitioner's fourth unexhausted claim (claim III.D.5) is that his trial counsel were ineffective for failing to seek instructions relating to duress and coercion. Once again, Petitioner does not refute Respondent's allegations of procedural default. Petitioner's state post-conviction appellate brief does not include this claim. Thus, Petitioner's claim that his trial counsel were ineffective for failing to request a duress and coercion jury instruction is procedurally defaulted.

Respondent contends Petitioner's claim that counsel was ineffective for failing to seek a charge regarding mental disease or defect, claim III.D.6, was not exhausted. Petitioner does not deny he procedurally defaulted this claim, and his state post-conviction appellate brief demonstrates he did not raise this claim in the state appellate court.

Petitioner has also raised the claim of ineffective assistance of counsel in the context of closing argument at the sentencing phase, claim III.D.7. Petitioner claims that although his trial counsel submitted several jury instructions for non-statutory mitigating circumstances, counsel failed to argue most of the mitigating factors during the penalty phase closing argument. In addition, Petitioner contends in claim III.D.D. that, individually and cumulatively, the errors of his trial counsel fell below a reasonable standard of practice and prejudiced Petitioner.

Respondent declares these claims are procedurally defaulted because Petitioner failed to raise these claims on appeal to the Tennessee Court of Criminal Appeals after his post-conviction petition was denied by the state trial court. Thus, Respondent contends that Petitioner's claims that trial counsel failed to adequately address the mitigating factors in closing argument (¶ III.D.7) and that the cumulative effect of trial counsel's alleged errors fell below a reasonable standard of practice (¶ III.D.D) are procedurally defaulted.

A petitioner must give the state courts a fair opportunity to correct the alleged constitutional violation by placing the issue squarely before the state courts, not simply allude to the issue in a statement of facts.[62] Logically, the state court did not interpret these claims as issues when they were not addressed in Petitioner's appellate brief. The record reveals the Petitioner failed to raise any of the above referenced claims of ineffective assistance of counsel when he appealed the trial court's decision denying

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[62] *See Wong v. Money*, 142 F.3d. 313, 322 (6th Cir. 1998) ("[t]his circuit has held that the doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court"); *Butler v. Rose*, 686 F.2d 1163, 1168 (6th Cir. 1982) (Exhaustion "is accomplished by giving the state courts an opportunity to pass upon and correct alleged violations of the constitutional rights of state prisoners in the first instance. Only when the state courts have had this opportunity and denied relief should resort be had to the federal court system. The exhaustion requirement is satisfied 'once the federal claim has been fairly presented to the state courts...'" (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

his post-conviction petition, thus resulting in procedural default. Petitioner has not demonstrated cause and prejudice to excuse this default. Consequently, since these issues were not raised in the state appellate court they are all procedurally defaulted for failure to exhaust (¶ III.D.1, 3-7, III.D.D.).

Accordingly, Petitioner's claims of ineffective assistance of counsel (III.D.1, 3-7, IIID.D.) are procedurally barred, thereby necessitating the **DISMISSAL** of these claims and the **GRANTING** of Respondent's motion for summary judgment on these claims.

5. Trial Court Failed to Properly Investigate Allegations of Trial Counsel's Conflicts and Improper Acts (Amd. Pet. ¶ IV)

Petitioner claims that when he alleged a conflict of interest between himself and his state trial attorney, Mr. McConnell, the trial judge failed to take steps to protect adequately Petitioner in violation of his constitutional rights. Respondent contends this claim is procedurally defaulted. Petitioner does not deny that he has procedurally defaulted this claim, but claims that once Petitioner presented this claim to the trial court it had a duty to protect his rights. Petitioner claims the state courts were on notice of the conflict issue and knew the trial court did not act appropriately.

This claim was not raised on direct appeal, nor does a review of the record by this Court reveal it was raised on post-conviction appellate review.

Consequently, Petitioner is not entitled to habeas review of his claim that the trial court failed to adequately investigate the actions of lead counsel when it was brought to the court's attention. The respondent will be **GRANTED** summary judgment on this claim, and habeas relief will be **DENIED** Petitioner.

6. Prosecutor Improperly Urged the Jury to Impose the Death Penalty Based on Non-Statutory Aggravating Facts (Amd. Pet. ¶ V. F)

Petitioner claims the prosecutor engaged in misconduct because he argued non-statutory aggravating factors. Specifically, Petitioner claims the prosecutor argued the death penalty was necessary, the death penalty was a deterrent to Petitioner, fault was the deciding factor, the law was "self-executing," the law mandates or requires the death penalty, the sentencing phase results in a secondary verdict, and it would be merciful to give Petitioner the death penalty.

Respondent contends Petitioner failed to exhaust these specific claims in state court and thus has procedurally defaulted this claim. Respondent argues this claim by Petitioner should be dismissed without further consideration. Petitioner counters by arguing his contention on direct appeal that "[t]hroughout the defendant's trial, the District Attorney and the Assistant District Attorney made statements and comments designed to inflame the passions and prejudices of the jury[,]" [Doc. 144] (quoting

[Addendum No. 16, p. 13]) was a fair representation of the claims presented to this Court.

The Court observes that on direct appeal Petitioner's tenth claim was that the prosecutor minimized the role of the jury in sentencing Petitioner to die when he argued the law is self-executing, the sentencing was a secondary verdict, and that the death sentence determination rests on law. Petitioner identified the specific statements and argued the improper arguments of the prosecutor minimized the jury's participation in sentencing the defendant to die. Petitioner used the same factual basis that he raises in this claim to support a claim based on a different legal basis.

Petitioner's non-statutory aggravator claim is not substantially equivalent to his burden-shifting claim presented to the state courts because he failed to present "both the legal theory and the facts on which [his] federal claim rests." *Lott v. Coyle*, 261 F.3d 594, 618-19 (6th Cir. 2001), *cert. denied*, 534 U.S. 1147 (2002). On direct appeal Petitioner argued that the statements by the prosecutor about the law being self-executing and that the law providing for the sentence minimized the jury's role; he did not argue that the prosecutor urged the jury to rely on non-statutory aggravators. Thus, he never presented this claim, *i.e.*, the prosecutor urged the jury to rely on non-statutory aggravators, to the state courts which has resulted in procedural default. Since Petitioner has failed to establish cause for his procedural default, actual prejudice resulting from the alleged constitutional error, or failure to consider the claim will result in a fundamental miscarriage of justice,

this Court may not review his prosecutorial misconduct claim in connection with the prosecutor's argument based on non-statutory aggravators.

Accordingly, Respondent will be **GRANTED** summary judgment on Petitioner's claim of prosecutorial misconduct in connection with non-statutory aggravating facts, and this claim will be **DISMISSED**.

7. Prosecutor Misled the Jury About Reasonable Doubt (Amd. Pet. ¶ V. G)

Petitioner claims the prosecutor engaged in misconduct because he misled the jury about the meaning and application of reasonable doubt. Specifically, Petitioner claims the prosecutor's argument shifted the burden and relieve the State of its burden of proof at both stages of trial.

Respondent contends Petitioner failed to exhaust these specific claims in state court and thus has procedurally defaulted this claim. Respondent argues that this Court is without jurisdiction to consider this claim, and it should be dismissed without further consideration. The Court presumes that Petitioner's argument that the claim was fairly presented and thus exhausted is again based on his claim on direct appeal that "[t]hroughout the defendant's trial, the District Attorney and the Assistant District Attorney made statements and comments designed to inflame the passions and prejudices of the jury" [Doc. 144] (quoting [Addendum No. 16, p. 13]).

Before this Court is able to consider this claim, it first must have been "fairly presented" to the state court. *Newton v. Million*, 349 F.3d 873, 877 (6th Cir. 2003), *citing McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001). Nowhere in his prosecutorial misconduct claim does the Court find, nor does Petitioner identify, where he raised the issue that the prosecutor mislead the jury about reasonable doubt which resulted in the State being relieved of its burden of proof. This issue was not raised on direct review in state court, and therefore it was procedurally defaulted. Since Petitioner has failed to establish cause for the procedural default, actual prejudice resulting from the alleged constitutional error, or failure to consider the claim will result in a fundamental miscarriage of justice, this Court may not review his prosecutorial misconduct claim in connection with the prosecutor's reasonable doubt argument. The Respondent will be **GRANTED** summary judgment on Petitioner's claim of prosecutorial misconduct in connection with the prosecutor's reasonable doubt argument, and this claim will be **DISMISSED**.

8. *Brady* Claim (Amd. Pet. ¶ VI)

Next, Petitioner claims violation of his Sixth and Eighth Amendments Rights in addition to a violation of the due process clause of the Fourteenth Amendment on the basis that the prosecution withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner claims the prosecution withheld exculpatory evidence that was mitigating and/or impeachment evidence, including evidence that co-defendant Martin had a prior

relationship with Miss Romines; he previously made a threat of harm to her, and he had a history of prior violent acts, which Petitioner claims would have demonstrated Martin's greater culpability for the crimes.

Respondent claims Petitioner has failed to demonstrate he exhausted these claims in state court. Respondent contends the materials upon which Petitioner relies to support his *Brady* claim were available to him as early as January of 1992, after the Tennessee Court of Appeals rendered its decision in *Capital Case Resource Center v. Woodall*, 1992 WL 12217 (Tenn. Ct. App. 1992), which provided that files maintained by the District Attorney General could be obtained under the Tennessee Public Records Act at the conclusion of the direct appeal in a criminal case.[63] Respondent observes that Petitioner's direct appeal ended in March of 1989 and his first petition for state post-conviction relief was filed on October 23, 1990. However, on September 11, 1996, Petitioner filed an amended petition for post-conviction relief, at which time he should have raised this claim. Therefore,

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[63] On May 10, 1995, the Post-Conviction Procedure Act became effective and that Act, along with the Supreme Court's adoption of Rule 28 of the Tennessee Rules of Post-Conviction Procedure, changed the result dictated by *Woodall*. The act and rule provide for discovery in post-conviction proceedings, and thus Petitioner could no longer obtain files under the Tennessee Public Records Act after the effective date of this act and rule. However, this is of no consequence to Petitioner because he apparently obtained the alleged "*Brady*" material during his state post-conviction proceedings.

Respondent submits, since the claim is now procedurally barred in state court, it is procedurally defaulted for purposes of federal habeas review.

Petitioner claims that the procedural default doctrine does not apply to *Brady* claims, but if it does, Petitioner contends he can demonstrate cause and prejudice to overcome any alleged procedural default. Petitioner claims that when evidence is concealed by state officials and that concealment is the basis for not raising a claim earlier, any asserted procedural default should be excused. Thus, argues Petitioner, the Respondant's assertion of procedural default must fail.

Petitioner alternatively argues that the Tennessee rule is inadequate to bar federal review because the statute of limitations was not consistently applied nor firmly established and regularly followed at the time it was applied to Petitioner. Petitioner claims that because the statute of limitations is unevenly applied, it is an inadequate bar to federal review of his *Brady* claim. Petitioner also makes an argument that the application of the statute of limitations rest primarily on federal law or is intertwined with federal law. Petitioner contends that Tennessee's post-conviction statute, TENN. CODE. ANN. § 40-30-102, is neither an adequate nor independent state law ground to bar federal review.[64]

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[64] It appears that Petitioner has basically made the same argument that was made to the Sixth Circuit in *Hutchison v. Bell*, 303 F.3d 720, 737-39 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2608 (2003). The Sixth Circuit addressed this argument and determined that the state procedural rules regarding later-

Pursuant to the Tennessee statute of limitations applicable to post-conviction proceedings, TENN. CODE ANN. § 40-30-102, Petitioner is now barred from raising any claim he has not previously raised. Petitioner avers this state procedural bar is not a proper basis for procedural default of his federal habeas claim.

A claim decided in state court on adequate and independent state grounds, including a procedural rule prohibiting consideration of the merits, bars habeas review unless the Petitioner shows cause and prejudice for default. *See* discussion *supra* Section III.D. A statute of limitations is the kind of adequate and independent state grounds that can erect a procedural bar to habeas review. *Coleman v. Thompson*, 501 U.S. at 731-32.

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arising claims involving successive petitions and statute of limitations for post-conviction petitions are procedural rules that are firmly established to provide an adequate and independent bar to federal review. "This Court has previously determined that Tennessee's waiver rule, T.C.A. § 40-30-206(g), which provides that claims not raised in a prior proceeding are barred, constitutes an adequate and independent state-law rule precluding habeas relief. *Id.* at 738, *also see Cone v. Bell*, 243 F.3d 961, 969 (6th Cir. 2001) (finding *Brady* claim procedurally barred by predecessor to T.C.A. § 40-30-206(g)), *rev'd on other grounds*, [535] U.S. [685], ...(2002)." *Hutchison v. Bell*, 303 F.3d at 737-39. The Sixth Circuit determined that the three year statute of limitations for post-conviction petitions in Tennessee that was applicable in *Hannah v. Conley*, 49 F.3d 1193, 1197 (6th Cir. 1995) (per curiam) was regularly applied and barred presentation of an unexhausted claim. Thus, Petitioner's arguments that the procedural default doctrine does not apply to *Brady* claims is unavailing.

Tennessee law imposes a statute of limitations on post-conviction proceedings:

> Except as provided in subsections (b) and (c), a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred. The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file such an action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c), the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period.

TENN. CODE ANN. § 40-30-102(a).

The Tennessee Supreme Court has held that under certain limited exceptions, this statute of

limitations cannot be applied without violating due process. *Sands v. State*, 903 S.W.2d 297 (Tenn. 1995); *Buford v. State*, 845 S.W.2d 204 (Tenn. 1992). In response to these decisions, the Tennessee Legislature amended the Post-Conviction Act in 1995 to enumerate the limited circumstances in which the statute of limitations for post-conviction proceedings is inapplicable:

> No court shall have jurisdiction to consider a petition filed after such time unless:
>
> (1) The claim in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial;
>
> (2) The claim in the petition is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
>
> (3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case

> in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

TENN. CODE ANN. § 40-30-102(b).

Petitioner has failed to show that any procedurally defaulted item included in his *Brady* claim falls within the exceptions enumerated in section 102(b). Accordingly, the Court finds the Tennessee statute of limitations applicable to post-conviction proceedings is a proper basis for procedural default. The Court also rejects Petitioner's contention that the limitations period is too short to constitute an adequate basis for procedural default.

A *Brady* violation consists of three elements as set forth by the Supreme Court of the United States in *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Petitioner must establish (1) that the evidence is favorable to him, (2) that it was suppressed by the government, whether intentional or not, and (3) that prejudice ensued. The prejudice or materiality element of an alleged *Brady* violation may be shown by demonstrating there is a reasonable probability of a different outcome of the trial had the *Brady* material been available.

However, Petitioner first must overcome the procedural default hurdle. Petitioner did not raise this *Brady* claim in state court. Since Petitioner may

no longer present his *Brady* claim to the state courts because those claims would be barred by the statute of limitations, the claim is procedurally defaulted for the purposes of federal habeas relief because Petitioner has no remedy currently available in state court. *See Coleman v. Thompson*, 501 U.S. at 735 n.1. Therefore, Petitioner must demonstrate cause and prejudice to excuse his procedural default before he is entitled to habeas review of this claim. In the absence of cause and prejudice, Petitioner could overcome the procedural default hurdle upon a showing of actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 314-15 (1995).

Petitioner has failed to show the materials which form the basis of his *Brady* claim were not available to him during his state post-conviction proceedings. In fact, on his direct appeal Petitioner claimed the trial court erred in preventing Petitioner from introducing evidence that his co-defendant previously knew the victim and made threats against her [Addendum No. 16, p. 41]. Thus, the record shows that Petitioner at least had some of this information prior to trial even though Petitioner has failed to explain how he obtained these materials and when he obtained them. Petitioner has not directed the Court's attention to anything to verify the materials were in the State's possession and that he never received them until he filed this habeas petition. Petitioner had two private investigators while preparing for his state criminal trial. Although one of his trial attorneys signed an affidavit that he was not aware of this information, there is no proof the other attorney was not aware of this information.

Petitioner also had a state post conviction proceeding where he could have obtained these documents. The record shows that Petitioner filed his state post-conviction petition on October 23, 1990, and amended it on September 11, 1996. However, on or about January 25, 1995, Petitioner's state post conviction counsel, relying on the precedent established in the case of *The Capital Case Resource Center of Tenn. Inc. v. James C. Woodal*, 1992 WL 12217 (Tenn. Ct. App. Jan. 29, 1992), filed a motion for disclosures pursuant to Tennessee Public Records Act, TENN. CODE ANN. §§ 10-7-101 *et seq.* [Addendum No. 22, p. 28]. The Court has not located an order disposing of this motion. However, since Petitioner apparently had this information prior to filing this habeas petition, it appears that he obtained the materials during his state proceedings. Inasmuch as a motion was filed in state court, if Petitioner did not obtain this information, it appears he failed to act diligently to develop the facts underpinning his *Brady* claim when he pursued his state post conviction petition.

Petitioner has failed to demonstrate that he did not have these materials or that they were not available to him during his state proceedings. Petitioner has failed to demonstrate by clear and convincing evidence that he did not possess the alleged *Brady* material during his state post-conviction proceedings. He has not shown that his failure to present these claims during his state post-conviction proceedings was due to suppression rather than his own neglect. If the Court assumes Petitioner did not obtain the evidence during his

state post-conviction proceedings, his lack of diligence renders the alleged *Brady* evidence claim procedurally barred in this habeas proceeding. Petitioner has not shown that the state court barred him from obtaining the alleged *Brady* evidence during his state post-conviction proceeding. Therefore, Petitioner is required to demonstrate cause for his failure to develop the facts in state court, and actual prejudice resulting from that failure. However, Petitioner has failed to show cause or prejudice.

Petitioner's *Brady* claim is therefore procedurally defaulted because it has not been presented to any state court, and state procedural rules preclude bringing these claims in state court. Accordingly, since the claim is now procedurally barred in state court, this Court is proscribed from reviewing it for purposes of federal habeas review because it is procedurally defaulted. Consequently, Petitioner's *Brady* claim will be **DISMISSED**, and Respondent will be **GRANTED** summary judgment on this claim.[65]

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[65] Even assuming, for sake of discussion, that Petitioner did not procedurally default his alleged *Brady* claim, he still would not be entitled to habeas relief on this claim because his guilt of first degree murder did not depend on proof that he was the dominant partner in killing the victims. The evidence and verdict supports the prosecution's theory that both defendants participated in subduing and murdering the victims. The burden is on Petitioner to prove that the alleged *Brady* evidence is either exculpatory or impeaching.

First, the note regarding an interview with Angela Sue Duncan states Miss Romines had been raped the previous

summer and that Ms. Duncan assumed it was Martin. The information obtained from Ms. Duncan, that in the days immediately prior to the murders Martin had threatened to kill Ms. Romines unless she renewed her relationship with Martin, does not exculpate Petitioner. Assuming Martin was the ringleader and planned the crime, the evidence still supports the jury's verdict that Petitioner was a willing assistant and participant. This information from Ms. Duncan does not exculpate Petitioner, does not support his defense that his participation was commanded at gunpoint by Martin, nor is it impeaching testimony. Moreover, Petitioner has not demonstrated that this evidence was material because he has not shown that there is a reasonable possibility the result of the proceeding would have been different if this evidence had been disclosed to the defense. *See United States v. Bagley*, 473 U.S. 667, 676 (1985).

Next Petitioner claims that information obtained from John Varnell indicating Martin had been talking about leaving the state and hijacking cars and killing people is *Brady* material. This evidence is not favorable to Petitioner nor does it exculpate him. Thus; Petitioner has failed to demonstrate that this evidence is material. In addition, Petitioner has not demonstrated that there is a reasonable probability that, had this evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. at 676.

Petitioner's fourth piece of alleged *Brady* material is information obtained from Sherry Stooksbury that she had observed Martin slaughter and mutilate the carcass of a cat. Petitioner claims this information would have shown the jury "the identity of the actual murderer and his particularly gruesome tendencies. . . ." Assuming without finding that this evidence was *Brady* material, Petitioner is still not entitled to any habeas relief because he has failed to demonstrate that there is a reasonable probability that had the evidence been disclosed to the defense, the result of the trial and sentencing would have been different. *Id.* First, the Court observes that Petitioner's retained trial counsel was well aware of Martin's

abnormal behavior and mental state because he had information that Martin may have been involved in a satanic cult. However, counsel testified the private investigator interviewed witnesses regarding Martin's involvement in cults and devil worshiping but when counsel spoke with the witnesses they failed to corroborate the allegations. Second, the Court observes that arguably this information lends credence to Petitioner's testimony that Martin was torturing Miss Romines when he stabbed her and that he licked her intestines. However, it does not exculpate Petitioner or demonstrate that he was not participating, aiding, and abetting. Nor does this information corroborate Petitioner's defense that his participation was commanded at gunpoint by Martin.

Petitioner's fifth piece of alleged *Brady* material is information obtained by Dan Farrell and James Housley that, after the crime, Martin was packing his belongings and said he was going to Florida. This information neither exonerates Petitioner, nor is it impeachment evidence. Therefore, Petitioner has failed to demonstrate this is material in addition to failing to show that the non-disclosure of this evidence was so serious that there is a reasonable possibility that the suppressed evidence would have resulted in a different verdict or sentence.

Finally, Petitioner claims the prosecution improperly withheld information of Martin's mental health. Petitioner concedes that the trial court authorized release of Martin's mental health records to the defense but contends the prosecution failed to disclose the information. Petitioner supports this claim with an affidavit from one of his trial attorneys that he did not have, nor was he aware of, the information contained in Martin's mental health record. Petitioner has not demonstrated that his other counsel did not have this information. In addition, the trial court authorized Petitioner's trial counsel access to Martin's juvenile records, and there is nothing in the record that indicates Petitioner's counsel was denied access to Martin's juvenile records. A failure of Petitioner's trial counsel to review Martin's juvenile records does not constitute suppression by the state. In addition, this

9. Denial of Fair Trial Due to Jury Misconduct (Amd. Pet. ¶ VII.B)

Petitioner claims his constitutional right to a trial before a jury untainted by outside influences was violated because the jury discussed the case prior to the introduction of evidence and continued to follow media coverage during jury selection. In addition, Petitioner claims his trial violated even minimal standards of due process so harmless error analysis is not proper. Respondent avers that Petitioner failed to exhaust this claim.

The record reveals that on direct appeal Petitioner claimed the trial court erred by overruling the defendant's motion for change of venue. However, nowhere in his direct appeal did he claim any jury misconduct. Petitioner's claim of jury misconduct is not the same as his claim on direct review that the trial court erred when he overruled his motion for change of venue.

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evidence does not exonerate Petitioner, nor is it necessarily favorable to him. More importantly, Petitioner has failed to demonstrate that the prosecution improperly withheld material evidence of Martin's mental health from Petitioner. Accordingly, in addition to failing to demonstrate the evidence was suppressed, Petitioner has failed to show that the result of the proceeding would have been different had the evidence been disclosed.

Moreover, Petitioner has not demonstrated that any of the alleged *Brady* material is impeaching or exculpatory. In addition, Petitioner has not shown that any non-disclosure was so serious that there is a reasonable probability that the suppressed evidence, individually or collectively, would have produced a different verdict.

State prisoners must exhaust their state remedies prior to raising claims in federal courts for habeas relief. To satisfy this requirement, habeas petitioners must give the highest court in the state in which petitioner was convicted a full and fair opportunity to rule on the petitioner's claim. *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). Petitioner failed to present the substance of this claim to the state court. Consequently, his jury misconduct claim is procedurally barred because Petitioner lacks any remedy for this alleged error in state court, and thus, no exhaustion problem exists. Rather, it is a problem of determining whether cause and prejudice exists to excuse his failure to present the claim in state courts. *Coleman v. Thompson*, 501 U.S. at 750-51. Petitioner does not assert any cause and prejudice to excuse his procedural default. Nor does he show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Hence, the Court does not have jurisdiction to consider this claim because it was not fairly presented to the state courts. *See Newton v. Million*, 349 F.3d 873, 877 (6th Cir. 2003).

Accordingly, Petitioner's claim of jury misconduct will be **DISMISSED**, and Respondent will be **GRANTED** summary judgment on this claim.

10. Jury Panel was Biased (Amd. Pet. ¶ VII.C)

Petitioner's last jury claim is that the jury was biased because the trial court refused to dismiss Loretta Padgett for cause after her son, Wendell

Padgett, was already seated on the jury. Respondent contends Petitioner failed to demonstrate he exhausted this claim in state court.

As previously discussed, to be fairly presented in state court a petitioner must raise the legal basis and factual basis of a claim in state court. Petitioner's claim that the jury panel was biased because relatives were on the panel is not the substantial equivalent to the erroneous denial of change of venue due to pretrial publicity claim that he raised in state court. *See Lott v. Coyle*, 261 F.3d 594, 618-19 (6th Cir. 2001), *cert. denied*, 534 U.S. 1147 (2002). Accordingly, Petitioner has procedurally defaulted this claim and has failed to show cause and prejudice to excuse his procedural default. In addition, he has not overcome his failure to show cause and prejudice with any proof of actual innocence. Consequently, the Court does not have jurisdiction to consider this claim of jury bias since it was not fairly presented to the state courts and it must be **DISMISSED**. Respondent is **GRANTED** summary judgment on this claim.

11. Erroneous "Reasonable Doubt" Jury Instruction (Amd. Pet. ¶ VIII)

Petitioner claims the trial court relieved the State of its burden of proof to establish guilt beyond a reasonable doubt when it gave the jury improper and incorrect instructions. Petitioner contends that the reasonable doubt instruction during the guilt/innocence phase of his trial failed to meet constitutional standards. In addition, Petitioner contends that the trial court relieved the prosecution

of its burden of proof at the sentencing phase by instructing the jury that "reasonable doubt is that doubt engendered by an investigation of all the proof in the case, and an inability after such investigation to let the mind rest easily as to the certainty of your findings." [Court File No. 111, p. 101]. Petitioner contends these instructions improperly relieved the prosecution of its burden of proof at the guilt and sentencing phases of the trial, in violation of his constitutional rights and the United State Supreme Court's decisions in *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (reasonable-doubt jury instruction was found to be constitutionally deficient), and *Cage v. Louisiana*, 498 U.S. 39 (1990) (when construing jury instructions the court looks at how reasonable jurors could have understood the charge as a whole).

Petitioner's reliance on *Cage* must be viewed in light of subsequent Supreme Court precedent. Specifically, the Supreme Court has disapproved of the standard of review language in *Cage* and has concluded that the correct standard is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the constitution.'" *See Estelle v. Mcguire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)).

Respondent contends Petitioner's claim fails for two reasons. First, according to Respondent, it fails because Petitioner is relying on the holdings of two Supreme Court cases that were decided subsequent to Petitioner's conviction becoming final; and second, because he failed to raise this claim on direct appeal.

Petitioner's conviction became final prior to the *Cage* and *Sullivan* decisions. The United States Supreme Court has not ruled on the retroactivity of *Cage* or *Sullivan*. *Sullivan*, a direct appeal from the Louisiana Supreme Court, was not a collateral attack and did not involve the retroactivity of the *Cage* rule. Furthermore, as noted, the *Cage* standard of review language upon which Petitioner relies has been disapproved in *Estelle v. McGuire, supra.* Although *Cage* and *Sullivan* were decided prior to Petitioner filing his amended state post-conviction petition, Petitioner did not raise this claim during his state post-conviction proceedings. Petitioner has therefore procedurally defaulted on this issue and has not shown cause and prejudice for his default. Accordingly, the Court will **DISMISS** Petitioner's claim arising from the reasonable doubt jury instruction as procedurally barred and **GRANT** Respondent summary judgment.[66]

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[66] Out of abundance of caution, the Court has reviewed the jury instruction and will address the merits of Petitioner's *Cage* claim. Petitioner claims the jury instruction addressing reasonable doubt in his case failed to meet the basic constitutional standards.

In *Cage*, the jury was instructed that "[w]hat is required is not an absolute or mathematical certainty, but a *moral certainty*." *Cage*, 498 U.S. at 40 (emphasis in original). The proper inquiry for a reviewing court is not whether the jury instruction could have been applied unconstitutionally, but whether there is a reasonable likelihood that the jury did apply the jury instruction in an unconstitutional manner. *Victor v. Nebraska*, 511 U.S. 1, 6 (1994). Before erroneous jury instructions warrant habeas relief, a petitioner must demonstrate that the jury instructions, taken as a whole, were

so infirm as to render the entire trial fundamentally unfair. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). An ambiguous instruction that is not necessarily erroneous, violates the Constitution only if there is a reasonable likelihood that the jury applied the instruction improperly. *Id.* at 72-73 n.4.

In *Victor* the Supreme Court held that the term "moral certainty" did not, of itself, render a "reasonable doubt" jury instruction unconstitutional. *Victor v. Nebraska*, 511 U.S. at 14. The *Victor* Court determined that the phrase "moral certainty" is constitutionally permissible if the rest of the instruction "lends content to the phrase," *Id.* at 14 and indicates the government's burden of proof. The Supreme Court found the following language to be constitutional in *Victor*:

> Reasonable doubt is defined as follows: It is not *mere possible doubt*; because everything relating to human affairs, and *depending on moral evidence*, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge.

Id. at 8. Recognizing that an instruction that only requires a jury to be morally certain of a defendants guilt impermissibly suggests "a standard of proof lower than due process requires or ... conviction on factors other than the government's proof[,]" *Id.* at 16, the Court found the "abiding conviction" language in conjunction with the "moral certainty" properly stated the government's burden of proof. *Id.* at 15.

The Sixth Circuit addressed a similar reasonable doubt jury instruction claim in *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997), *cert. denied*, 523 U.S. 1079 (1998). Like the Sixth Circuit, the Court finds that Petitioner's reasonable doubt instruction is more like the acceptable language in *Victor* rather than the unacceptable language in *Cage*. In *Austin* the trial court instructed the jury:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. *Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.* (Emphasis added).

Austin v. Bell, 126 F.3d 846.

The trial Court in Petitioner's case gave the following jury instruction:

> The law presumes the innocence of the defendant, and that presumption stands as a witness for the defendant and maintains until it is overcome by satisfactory evidence of guilt, and before he can be convicted, his guilt must be established beyond a reasonable doubt, not a captious, possible or imaginary doubt, but an honest doubt, engendered after an investigation of the entire evidence, and an inability after such investigation, to let the mind rest easily as to the certainty of guilt.

[Addendum No.13, p. 46]. Petitioner complains about the "satisfactory evidence of guilt" language in this instruction. However, the trial court explained that phrase by instructing that before Petitioner could be convicted, "his guilt must be established beyond a reasonable doubt, not a captious, possible or imaginary doubt[.]" Therefore, the Court does not find this language to render the instruction constitutionally defective. Petitioner also complains about the "honest doubt" language which the Court does not find lowered the burden of proof. *See Rogers v. Howes*, 64 Fed. Appx. 450, 456-57 (6th Cir.) (unpublished table decision), *available in* 2003 WL 2007939 at * 6, *cert denied*, 124 S. Ct. 252 (2003).

> It is not necessary that each particular fact be proved beyond a reasonable doubt, if enough facts are proved to satisfy the jury, beyond a reasonable doubt, of all the facts necessary to constitute the crime charged.
>
> Before a verdict of guilt is justified, the circumstances taken together must be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion and producing in effect a moral certainty that the accused committed the offense.

[Addendum No. 13, p. 48]. The instruction in Petitioner's case is more like the acceptable instruction in *Victor* and *Austin* rather than the unacceptable *Cage* language. The phrase "if enough facts are proved to satisfy the jury, beyond a reasonable doubt, of all the facts necessary to constitute the crime charged[,]" and the phrase "the circumstances taken together must be of a conclusive nature and tendency" lends content and explanation to the phrase "a moral certainty" [Addendum No. 13, p. 48]. However, this instruction is taken from an instruction on how to evaluate circumstantial evidence and has nothing to do with the definition of reasonable doubt. *See Alley v. Bell*, 101 F.Supp. 2d 588, 646 (W.D. Tenn. 2000), *aff'd* 307 F.3d 380 (6th Cir. 2002), *cert denied*, 124 S. Ct. 99 (2003). The Court does not find that, taken as a whole, the language of the questioned instructions created a reasonable likelihood that the jury applied the instruction in such a way so as to lower the state's burden of proof.

Finally, Petitioner complains that during the sentencing phase of the trial the jury was instructed that "[r]easonable doubt is that doubt engendered by an investigation of all the proof in the case, and an inability after such investigation to let the mind rest easily as to the certainty of your findings." The Court does not find that the challenged language corrupted the reasonable doubt instruction. The Sixth Circuit has held virtually identical reasonable doubt instructions to be constitutional in the past. *See Alley v. Bell*, 101 F.Supp. 2d at 645-46; *Workman v. Bell*, 178 F.3d 759, 776-77 (6th Cir. 1998),

12. Avoiding Arrest and Prosecution Aggravator (Amd. Pet. ¶ IX.B. Parts 2 & 3)

Under the second section of part B of claim nine, Petitioner contends that "[b]y applying the avoiding arrest and prosecution aggravator to any situation in which a murder follows a felony (or in which it follows a felony in which the victim obtained an opportunity to identify the perpetrator), Tennessee further renders the aggravator unconstitutional because it becomes coterminous with the seventh aggravating circumstance — murders during the commission of a felony, which was also applied in Mr. West [sic] case." [Court File No. 111, p. 107]. This claim was not raised in state court and consequently is procedurally barred and will be **DISMISSED**.

In the third part of this claim regarding the avoiding arrest aggravator, Petitioner attacks the state court decisions finding that TENN. CODE ANN. § §40-30-111 and 40-30-112 effectively prevent the application of Rule 52(b) of the Tennessee Rules of Criminal Procedure.[67] Petitioner argues that absent

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cert. denied, 528 U.S. 913 (1999); and *Coe v. Bell*, 161 F.3d 320, 329 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999).

Therefore, even if Petitioner had not procedurally defaulted his reasonable doubt claim and even if the alleged *Cage* error is reviewable by this habeas Court, Petitioner still would not be entitled to any habeas relief because he has failed to demonstrate a reasonable likelihood that the jury applied the instruction in way so as to lower the state's burden of proof.

[67] Tenn. R. Crim. Proc. Rule 52(b) provides:

TENN. SUP. CT. R. 28,[68] no grounds exist for refusing to apply Rule 52(b) to Petitioner's case.

Petitioner claims the state court applied Rule 28 to refuse to apply Rule 52(b) in clear violation of Petitioner's constitutional rights through the application of law, *ex post facto*. In this claim Petitioner is challenging the Tennessee Supreme Courts alleged application of Rule 28 to block review of a constitutional claim. "A federal habeas court does not sit as a traditional appellate review with supervisory power to correct general errors committed by a state authority; rather, it has power only to accord relief for *constitutional violations*."

> An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.

Under the Committee Comment is the following:

> Plain error may, not must, be noticed by the appellate court, even where substantial justice is involved.

[68] Rule 28 addresses the rules of post-conviction procedure. The specific section Petitioner refers to is section 3(b) which was adopted by order entered on November 17, 1995 (after Petitioner filed his state post-conviction petition). Section 3(b) is titled applicability of other rules and provides:

> Neither the Tennessee Rules of Civil Procedure nor the Tennessee Rules of Criminal Procedure apply to post-conviction proceedings except as specifically provided by these rules.

Rule 28 Supreme Court Rules.

Linger v. Akram, 23 Fed. Appx. 248, 252 (6th Cir. 2001), (unpublished table decision), *available in* 2001 WL 1136040 *citing Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974).

This is a collateral matter challenging retroactively the application of Rule 28 of the Tennessee Supreme Court Rules, a state procedural rule which is not a proper issue to be addressed in habeas proceedings. *Alley v. Bell*, 100 F.Supp.2d 588, 612 (W.D. Tenn. 2000), *aff'd*, 307 F.3d 380 (6th Cir: 2002), *cert. denied*, 124 S. Ct. 99 (2003) ("Error committed during the state post-conviction proceedings cannot provide a basis for federal habeas relief."). In any event, Petitioner did not "fairly present" this claim in state court. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (to obtain federal habeas relief under 28 U.S.C. § 2254, available state court remedies must be exhausted by presenting the claim to the state's highest court). Consequently, this claim is not a cognizable ground for habeas relief. In addition, Petitioner has failed to raise this claim at any prior proceeding.

Accordingly, Petitioner's claims attacking the avoiding arrest aggravator on the grounds that it is indistinguishable from the felony murder aggravator and that the state supreme court violated Petitioner's rights when it applied Rule 28 will be **DISMISSED**, and Respondent will be **GRANTED** summary judgment on this claim.

13. Unconstitutional Felony Murder Aggravating Circumstance (Amd. Pet. ¶ IX.C)

The last claim under paragraph nine of Petitioner's petition concerns the felony murder aggravating circumstance. Petitioner argues that since the jury failed to specify which underlying felony it found unanimously, but instead listed several underlying felonies, there is no proof the jury unanimously agreed as to any particular underlying felony.

Respondent asserts that this claim is procedurally barred because Petitioner failed to raise it on direct review. Petitioner claims his procedural default is excused by the ineffectiveness of his trial counsel. Specifically, Petitioner avers that trial counsel failed to raise this issue on direct review and that such failure is a grievous error. Petitioner claims he was prejudiced because the jury's failure to identify the felony on which it based its finding of the felony murder aggravator deprived him of the right to have a court determine whether the aggravator was found unanimously.

Petitioner has not exhausted this claim. Furthermore, he cannot demonstrate that counsel was ineffective for failing to raise this claim on direct review because prior to the sentencing hearing, the jury unanimously found him guilty of two counts of murder, one count of aggravated rape, two counts of aggravated kidnapping, and one count of larceny. Consequently, since the jury had unanimously convicted him of each of the crimes listed in the

aggravating circumstance, counsel was not ineffective for failing to claim the felony murder aggravating circumstance was unconstitutional since the jury did not specify which underlying felony it found unanimously. Moreover, Petitioner has not demonstrated prejudice.

Petitioner has not demonstrated that his procedural default should be excused, and therefore this claim is procedurally barred. Accordingly, the Court will **DISMISS** Petitioner's claim regarding the felony murder aggravating circumstance and **GRANT** summary judgment to Respondent.

14. Burden Shifting Instruction (Amd. Pet. ¶ X.)

In claim ten, Petitioner asserts that in violation of his Eighth and Fourteenth Amendments, the trial court instructed the jury during sentencing that mitigating circumstances had to be found unanimously and had to outweigh the aggravating circumstances. Petitioner claims this instruction improperly shifted the burden of proof. Petitioner specifically avers that there is a reasonable probability that when the jurors considered the jury instructions and verdict form, they interpreted the instructions to require them to unanimously agree on any given mitigating circumstance(s) before such circumstance(s) could be weighted against any aggravating circumstance(s) found by the jury.

Respondent asserts that this claim is subject to dismissal without further consideration because Petitioner failed to raise this claim on direct review. Petitioner responded that he raised the issue in his

amended post-conviction petition and claims the principles of fundamental fairness dictate that this claim now be review. Petitioner did not cite to any federal law to support his fundamental fairness argument. Moreover, Petitioner failed to raise this claim in the state appellate courts.

Petitioner failed to submit this claim to the Tennessee courts, resulting in procedural default. Petitioner has failed to demonstrate cause and prejudice or actual innocence. Accordingly, the Court will **DISMISS** Petitioner's burden shifting mitigating circumstance jury instruction claim and **GRANT** Respondent summary judgment on this claim.

15. Actual Innocence (Amen. Pet. ¶ XI)

Petitioner claims that in violation of the Eighth and Fourteenth Amendments he was convicted of the offenses although he is actually innocent of all offenses. He sights *Herrera v. Collins*, 506 U.S 390 (1993), in support of his claim.

Petitioner has failed to set forth any facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Thus, Petitioner's claim that he is actually innocent will be **DISMISSED** for failing to set forth in summary form the facts supporting this claim. Rule 2(c) of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

However, assuming for the sake of discussion that Petitioner properly stated his claim with factual

support, this claim would be dismissed on procedural default grounds. Because Petitioner failed to present this claim on direct appeal or during his state post-conviction appeal to the Tennessee courts, thus failing to exhaust his remedies, and because this claim does not meet the criteria to excuse Petitioner's procedural default, this Court is prohibited from granting habeas relief. 28 U.S.C. § 2254.

In addition to ignoring the overwhelming evidence against him and failing to identify any evidence in the state court record to support his claim of actual innocence, Petitioner is claiming actual innocence itself as a constitutional claim. "A claim of 'actual innocence' is not itself a constitutional claim, but instead, a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Thus, Petitioner is not entitled to habeas relief on this claim.

Accordingly, Respondent will be **GRANTED** summary judgment, and Petitioner's claim of actual innocence will be **DISMISSED** as inadequately pled, procedurally barred, and without merit.

16. Trial Court Failed to Charge the Lesser Included Offense of First Degree Murder, Including Second Degree Murder (¶ XIII)

Petitioner's thirteenth claim is that the trial court's failure to instruct the jury on the lesser included offenses of first degree murder, including second degree murder, violated the cardinal rule of

Beck v. Alabama, 447 U.S. 625 (1980). In *Beck* the trial judge was statutorily prevented from instructing on the lesser included offenses such that the jury was required to either convict the defendant of the capital offense, or set him free. Petitioner claims that *Beck* requires the trial court to instruct on lesser included offenses regardless of whether he requested or objected to the instruction.

As previously stated in this memorandum (*supra* IV. a. 4.), Petitioner knowingly and intentionally declined the lesser included offense instructions. However, Petitioner asserts that *Beck* and its progeny prohibit a defendant in a capital case from waiving lesser included offense instructions. Although Petitioner acknowledges that he specifically requested that the trial court refrain from charging any lesser included offenses, he now argues that the trial court should have disregarded that request and protected the jury's right by allowing it to convict on a lesser included offense.

Petitioner's claim is procedurally defaulted. Petitioner first raised this claim in his state post-conviction petition. However, he failed to examine his attorneys concerning their decision to forgo the instruction on the lesser included offenses. The appellate court observed that a complaint about failure to charge a lesser included offense is not cognizable on post-conviction review, but determined Petitioner waived the issue, and alternatively found, substantively, the issue was without merit *West v. State*, 1998 WL 309090, at *10 (Tenn. Crim. App. 1998). Once again, Petitioner incorrectly claims the issue has been properly preserved for habeas review.

If the state court clearly and expressly rests its judgment on a state procedural bar, then a federal habeas court is prevented from reviewing the claim. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). An alternative holding does not require a federal court to disregard a procedural bar. *Id.; Coe v. Bell*, 161 F.3d at 330; *McBee v. Abramajtys*, 929 F.2d 264, 267 (6th Cir. 1991). The Court of Criminal Appeals of Tennessee specifically found "this issue is waived." *West v. State*, 1998 WL 309090, at *10 (Tenn. Crim. App. 1998). Therefore, since the state court's judgment rested on a state procedural bar, its alternative finding that substantively the issue was without merit is of no consequence to the procedural bar finding. This claim is procedurally defaulted, and Petitioner has not persuaded the Court that a manifest miscarriage of justice will result if the Court declines to excuse this procedural defaulted claims, nor has he established cause and prejudice to excuse his default. Consequently, Petitioner's claim regarding the lesser included offenses jury instruction will be **DISMISSED**, and Respondent will be **GRANTED** summary judgment on this claim.

17. Denial of Effective Assistance of Counsel on Direct Appeal (¶ XVI)

As his sixteenth claim for relief, Petitioner contends he was denied effective assistance of counsel on direct appeal of his conviction in violation of his Sixth, Eighth, and Fourteenth Amendment rights. The Court observes that in his amended habeas petition, Petitioner fails to plead this claim with the required factual specificity, but rather,

asserts he will raise the specific claims when the Respondent asserts the claims should be dismissed as procedurally defaulted. Petitioner has the burden to prove exhaustion. *Rust v. Zant*, 17 F.3d 155, 160 (6th Cir. 1994). Petitioner's response to the Respondent's allegation of exhaustion is:

> The State has asserted the affirmative defense of procedural default against Claims I(c), IV and X. Mr. West raised this issue in his amended post-conviction petition at pages 6-8. *See also* Claims III(D)(2, (D)(5) and X. Mr. West alleges ineffective assistance of direct appeal counsel as cause and prejudice to overcome any procedural bar.

Petitioner did not identify or specify any specific claims of ineffectiveness on direct appeal. Since Petitioner has not complied with Rule 2(c) of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, which requires petitioner to include a summary of the facts supporting each ground of his petition, this claim will be **DISMISSED** as inadequately pled, and Respondent will be **GRANTED** summary judgment.[69]

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[69] In any event, the record reveals that this claim of ineffective assistance of counsel on direct appeal was never raised at the appellate level during Petitioner's state post-conviction proceedings. Thus, as an alternate holding, the claim is procedurally defaulted.

18. Cruel and Unusual Punishment Claim (Amd. Pet. ¶ XVIII)

Petitioner avers the death penalty constitutes cruel and unusual punishment in violation of his Eighth and Fourteenth Amendment rights because of the length of time he has been incarcerated. Petitioner claims that the offense for which he is convicted occurred in 1986, he was convicted and sentenced to death in March 1987, and since that time he has been pursuing non-frivolous remedies. Petitioner contends since he has been incarcerated for nearly fifteen years (at the time he filed his habeas petition), execution of the death sentence would constitute cruel and unusual punishment given the strain of incarceration for all these years. In further support of this claim, Petitioner cites *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of writ of *certiorari*) and *Lackey v. Texas*, 514 U.S. 1045, (1995) (Stevens, J., respecting denial of *certiorari*).

In rebuttal to Respondent's procedural default argument, Petitioner contends the claim is not procedurally defaulted because he could not have raised it on direct review. However, Petitioner could have raised this claim during state post-conviction proceedings which terminated in 2000, approximately thirteen years after Petitioner was initially incarcerated. Petitioner has failed to cite any direct Supreme Court authority supporting his position and therefore, his claim cannot succeed under 28 U.S.C. § 2254(d).

Petitioner cites to *Lackey v. Texas*,[70] which is a memorandum opinion denying *certiorari* on this issue. A denial of *certiorari* by the United States Supreme Court is not a ruling on the merits and does not constitute clearly established federal law. Petitioner has failed to present this claim to the state courts[71] during his state post-conviction proceedings. Therefore, the Court will **DISMISS** Petitioner's cruel and unusual punishment claim as procedurally barred.

19. Fatally Flawed Proportionality Review (Amd. Pet. ¶ XXI)

As his twenty-first claim, Petitioner asserts that he is entitled to habeas relief because the proportionality review conducted by the Tennessee Supreme Court was fatally flawed since the data from other similar cases was insufficient and inaccurate, which resulted in the state court having

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[70] Justice Stevens wrote,

> Though the importance and novelty of the question presented (whether executing a prisoner who has spent 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment) by this certiorari petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts.

Id. at 1045.

[71] Petitioner's second state post-conviction proceeding ended in 2000. He could have raised his "too-long-on-death-row-claim" at that time when he had been on death row for thirteen years.

no meaningful way to distinguish between life-worthy and death-worthy cases in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

Respondent asserts that Petitioner's proportionality review claim is not cognizable in this federal habeas corpus proceeding since it does not implicate the deprivation of a constitutional right citing *Engle v. Issac*, 456 U.S. 107, 119 (1982). As further support of this position, Respondent cited to the proposition that "[t]here is no federal constitutional requirement that a state appellate court conduct a comparative proportionality review." *McQueen v. Scroggy*, 99 F.3d 1302, 1333-1334 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257 (1997), *citing Pulley v. Harris*, 465 U.S. 37, 50-51 (1984); *Coe v. Bell*, 161 F.3d at 352 (no Eighth Amendment right to proportionality review).

The Court observes that Petitioner failed to raise this claim on direct review. Although Petitioner raised this claim in his state post-conviction petition, he abandoned it on appeal. Hence, Petitioner procedurally defaulted his proportionality claim because he failed to raise it to in the Court of Criminal Appeals or in his application for permission to appeal to the Tennessee Supreme Court.

Accordingly, the Court finds Petitioner failed to fairly present his proportionality review claim to the state courts and has failed to allege any cause and prejudice for his procedural default. Because Petitioner has not shown actual innocence, he has failed to furnish a basis for federal review. The Court will **DISMISS** Petitioner's proportionality review

claim due to procedural default and in the alternative because it is not cognizable on habeas review. Respondent will be **GRANTED** summary judgment on this claim.

E. Claims Raised Only as a Violation of State Law

1. Erroneous Introduction of Demonstrative Exhibit (Amd. Pet. ¶ I.D)

Petitioner avers his constitutional rights were violated when the state trial court allowed the introduction of a demonstrative exhibit purporting to show the age, height, and weight of the two defendants when the State's witness admitted the drawing was not to scale. Petitioner claims a photograph of him and Martin were introduced for the same purpose. Petitioner claims the introduction of this evidence was prejudicial and violated his constitutional rights.

On direct appeal Petitioner presented this issue to the Tennessee Supreme Court as a violation of state law and not as a violation of his federal constitutional rights. Petitioner cited only state cases. Therefore, this issue is "not cognizable in a federal habeas corpus proceeding." *Spalla v. Foltz*, 788 F.2d 400, 405 (6th Cir. 1986), *cert. denied*, 479 U.S. 935 (1986). *See also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions[.]"); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state

law[.]"); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); *Sinistaj v. Burt*, 66 F.3d 804, 807 (6th Cir. 1995) ("Errors of state law alone cannot form the basis of relief under federal habeas corpus."); *Houston v. Dutton*, 50 F.3d 381, 385 (6th Cir.), *cert. denied*, 516 U.S. 905 (1995) ("When and how state law applied to a particular case is a matter on which the state supreme court has the last word. No federal issues are implicated and no federal questions is presented in determining whether a change in state law is to be applied retroactively.") (citation omitted). To the extent Petitioner seeks to present this claim as a federal constitutional issue, he is procedurally barred from doing so. However, if this claim were properly before this Court it would be dismissed because Petitioner has failed to demonstrate that the state court decision was contrary to, or involved an unreasonable application of, federal law; or that it was an unreasonable determination of the facts. Accordingly, this claim will be **DISMISSED**, and Respondent's motion for summary judgment on the erroneous introduction of demonstrative exhibit claim will be **GRANTED**.

2. Failure to Grant Mistrial (Amd. Pet. ¶ 1.F)

Petitioner claims the trial court failed to grant a mistrial when the prosecution questioned Petitioner regarding his wife's plan to leave him and her fear of him. Petitioner did not raise this specific claim in state court on direct appeal as a deprivation of a federal constitutional right, nor has he addressed it as such in his amended petition. In his brief on direct

appeal, Petitioner argued that the appellate courts of Tennessee have held the use of questions such as the ones by the prosecutor are clearly improper. Petitioner then cited a state appellate case.

The Supreme Court of Tennessee addressed this claim on direct appeal:

> Defendant asserts that the trial judge erred in not granting a mistrial because of a question the district attorney asked defendant on cross examination at the sentencing hearing. First the prosecutor asked defendant if it was not true that "just before this happened," his wife was about to leave him, which he denied. Defendant was then asked "isn't it true that she is still afraid that you will get out someday?" Defendant objected at that point and the trial judge promptly sustained the objection. After completion of the district attorney's cross examination, defendant moved for a mistrial, which the trial judge denied, but he expressly instructed the jury to "disregard the question and any inference to be drawn from the question." The question was improper, but the action taken by the trial judge cured the error and he did not abuse his discretion in denying a mistrial. *See State v. Compton*, 642 S.W. 2d 745 (Tenn. Crim. App. 1982).

State v. West, 767 S.W.2d 387, 397 (Tenn. 1989).

To exhaust state remedies, a petitioner must present each factual claim to the state courts as a matter of specific federal law. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) ("It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made."). This Petitioner did not do. He only raised this claim in state courts solely as an error of state law. A claim solely based on state law is not cognizable on habeas review. However, even if this claim was properly before the Court, Petitioner would not be granted habeas relief because he failed to meet his burden of establishing that the state court decision involved an unreasonable determination of the facts or, that the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law. Accordingly, Respondent will be **GRANTED** summary judgment on the claim that the trial court failed to grant a mistrial when Petitioner's wife was improperly questioned, and this claim will be **DISMISSED**.

3. Prosecutor Misstated Petitioner's Weight (¶ V. D).

Petitioner claims the prosecutor grossly misstated Petitioner's weight to make it appear that Petitioner was substantially larger than his accomplice, Martin, when in fact, Petitioner was twenty pounds lighter than the State suggested. Petitioner also complains about a chart the State introduced which, according to Petitioner, depicted a very young boy next to the body of a fully developed

man, which the State identified as the bodies of those of Martin and Petitioner respectively.

During cross examination, the prosecutor asked Petitioner if he weighed 170 pounds and Petitioner responded that he did not weigh 170 pounds and had never weighed over 150 pounds in his entire life. In addition, a chart was introduced as a demonstrative exhibit to illustrate the respective age, height, and weight of the two defendants.

Respondent contends that Petitioner failed to demonstrate he exhausted these specific claims in state court. Respondent states this specific claim was not included in Petitioner's claim on direct appeal regarding prosecutorial misconduct.

On direct appeal Petitioner claimed he was prejudiced by the introduction of diagrams and photos allegedly designed to demonstrate the relative sizes of Petitioner and the co-defendant. This claim was raised on direct appeal as an allegation of violation of state evidentiary law. Therefore, this claim was not raised on direct appeal as a claim of prosecutorial misconduct. In addition, it was not raised during his state post-conviction proceedings. Petitioner failed to raise this claim in state courts as a federal constitutional claim of prosecutorial misconduct. Petitioner only raised this claim in state courts solely as an error of state evidentiary law. A claim solely based on state law is not cognizable on habeas review. Moreover, when a petitioner fails to raise a claim in state court and fails to demonstrate cause and prejudice for his failure to raise the claim

in state court, the claim is not cognizable on habeas review because it has been procedurally defaulted.

However, if the claim was properly before this Court, Petitioner would not be entitled to any habeas relief because he has not demonstrated that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or that the state court's decision was contrary to or involved an unreasonable application of federal law.

Accordingly, this claim will be **DISMISSED** due to Petitioner's failure to raise it in state court. Respondent will be **GRANTED** summary judgment on the claim that the prosecutor misstated Petitioner's weight.

4. Arbitrary Death Sentence (¶ XIV.B.)

Petitioner's fourteenth complaint is that his sentence is arbitrary. Earlier in this memorandum opinion, the Court determined part A of this claim was time-barred because Petitioner failed to include it in his original habeas petition. Therefore, the Court will only analyze the second part of the claim, which consists of an allegation that Petitioner's death sentence is disproportional to Martin's life sentences. Petitioner contends there is no rational basis for the difference in sentences as he acknowledges that the only reason Martin was able to plead guilty and receive a life sentence is that Tennessee law prohibits the execution of a juvenile. Martin was seventeen years old at the time of the crime and Petitioner was twenty-four years old.

On direct appeal Petitioner claimed the death penalty could not be imposed upon him because Martin only received two life sentences. Petitioner claimed the statute prohibiting the imposition of the death penalty on a juvenile did not provide a rational basis for the disproportionate sentences because the proof in light least favorable to Petitioner still demonstrated Martin was culpable, or more culpable, than Petitioner. The Supreme Court of Tennessee determined "that the statutes prohibiting imposition of the death penalty on juveniles provide[d] a rational basis for the disparity in sentences." *State v. West*, 767 S.W.2d at 402.

Petitioner raised this issue strictly as a state law claim. He cited to two Tennessee statutes which addressed disproportionate sentences and inequities in sentences, and he cited to one state case, *State v. Jenkins*, 733 S.W.2d 528 (Ct. Crim. App. 1987), which discussed disparity in sentences.[72]

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[72] In state court Petitioner relied on the following which is taken from his brief on direct appeal:

> TENN. CODE ANNO. § 39-2-205(c)(4) provides that the court shall determine whether '[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.' In addition, TENN. CODE ANNO. § 40-35-103(3) provides 'Inequalities in sentences that are unrelated to a purpose of this chapter should be avoided.'
>
> The Tennessee Court of Criminal Appeals, in *State v. Jenkins*, 733 S.W. 2d 528 (Ct. Crim.App 1987), when addressing disparity in the sentences

Matters of state law may not provide a basis for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (noting that only where a state law violation is also a violation of federal law may a petitioner obtain federal habeas relief). "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 42 (1984). The burden is on Petitioner to demonstrate that his claim which was based solely on an alleged error of state law in the Tennessee courts, *i.e.*, the state court erred in applying its own law regarding disproportionate sentences, rendered his trial so fundamentally unfair that it deprived him of substantive due process in violation of the United States Constitution. *See Norris v. Scholten*, 146 F.3d 314, 329 (6th Cir. 1998). Accordingly, before this Court can address this claim, Petitioner must demonstrate that the imposition of the death penalty on him, when his juvenile co-defendant received two life sentences, deprived him of due process so as to provide a basis for federal habeas relief. *See Lott v. Coyle*, 261 F.3d 594, 607 (6th Cir. 2001).

Proportionality review of a death sentence is not constitutionally required. *Pulley v. Harris*, 465 U.S. at 48. "The Eighth Amendment does not require

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> of co-defendant's charged with possession of marijuana, held: disparity between one defendant's three-year sentence and second defendant's one-year sentence would be corrected [sic] by reducing three-year sentence to one-year sentence[.]

[Addendum No. 16, p. 76].

strict proportionality between crimes and sentences. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991); *see also Ewing v. California*, 538 U.S. 11, 23 (2003). Although Petitioner attacks his sentence based on disproportionality, he claims there is no rational basis for him to receive the death penalty when Martin received life sentences. To the contrary, there is a rational basis. The United States Supreme Court

> has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Thompson v. Oklahoma, 487 U.S. 815, 835 (1988).

It is within the province of the Tennessee Legislature to set policy and enact laws that distinguish between adult and juvenile offenders. The legislature has determined juveniles should not

be treated as severely as adults, thus they cannot receive the sentence of death when they commit the crime of murder. Clearly, by the plain language of the statute, TENN. CODE ANN. § 37-1-134(a)(1)(A)(B),[73] the legislature intended to treat juveniles, once transferred to an adult court, as an adult in every aspect except the possibility of a sentence of death. The classification is reasonable, as it is rational to treat juveniles less severely than adults and protect juveniles from the harshest

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[73] **§ 37-1-134. Transfers to criminal courts**

> (a) After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances, of this state, the court, before hearing the petition on the merits, may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of competent jurisdiction. The disposition of the child shall be as if the child were an adult if:
>
> (1) The child was sixteen (16) years or more of age at the time of the alleged conduct, or the child was less than sixteen (16) years of age if such child was charged with the offense of first degree murder, second degree murder, rape, aggravated rape, aggravated robbery, especially aggravated robbery, kidnapping, aggravated kidnapping or especially aggravated kidnapping or an attempt to commit any such offenses. The district attorney general may not seek, nor may any child transferred under the provisions of this section receive, a sentence of death for the offense for which the child was transferred;

TENN. CODE ANNO. § 37-1-134.

penalties. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) ("Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.").

In addition, the prosecutor acted within his authority by deciding to prosecute one co-defendant as death-eligible and the other as death-ineligible. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). The fact that Martin was death-ineligible did not unfairly prejudice Petitioner. *See Harris v. Rivera*, 454 U.S. 339, 345-48 (1981) (holding that even if the acquittal of a co-defendant rested on an improper ground, that error would not create a constitutional defect in a defendant's guilty verdict which was supported by sufficient evidence and was the product of a fair trial).

Petitioner's death sentence is the most severe penalty permitted by law. Regardless of Petitioner's contentions, the jury verdict demonstrates the jury believed the State's theory that both defendants participated in brutal and atrocious crimes. In addition, the evidence supported the jury's finding that Petitioner participated in the crimes and was not the victim he claims to be. The fact that Tennessee law prohibits the State from seeking the death penalty against minors, thus exempting Martin from the death penalty, does not render Petitioner's death sentence unconstitutional.

Accordingly, the State had a rational basis for seeking the death penalty for Petitioner, even though state law prevented the State from seeking the death

penalty for Martin. Consequently, Petitioner has failed to demonstrate that the imposition of the death penalty for him, but not for Martin, rendered his trial so fundamentally unfair that it deprived him of substantive due process in violation of the United States Constitution. This failure results in denial of federal habeas relief on this state law claim. The Court also observes that although Petitioner claims the state court's decision upholding his death sentence is contrary to, or an unreasonable application of, federal law or an unreasonable determination of the facts, he did not identify any case supporting his allegation and thereby failed to meet his burden had this claim been properly before this Court.

Since Petitioner raised this claim in the state courts strictly as a state law claim, he has procedurally defaulted this claim on the basis of federal law. Since he was not able to demonstrate cause and prejudice to excuse his default, this state law claim regarding his alleged arbitrary death sentence will be **DISMISSED**, and Respondent will be **GRANTED** summary judgment.

V. CONCLUSION

Respondent's motion for summary judgment will be **GRANTED** as to all claims. Petitioner is not entitled to an evidentiary hearing, and his § 2254 petition will be **DISMISSED**.

A judgment will enter.

s/ Thomas A. Varlan
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF TENNESSEE
at KNOXVILLE

STEPHEN MICHAEL WEST,	)	
Petitioner,	)	No.: 3:01-cv-91
v.	)	(Varlan/Shirley)
RICKY BELL, WARDEN, Riverbend Maximum Security Institution,	)	
Respondent.	)	December 10, 2004

Order and Supplement
To Memorandum Opinion & Order, and Judgment

This case is a habeas corpus action filed pursuant to 28 U.S.C. § 2254 by Petitioner Stephen Michael West ("West" or "Petitioner"), a death-row inmate in a state prison in Nashville, Tennessee. Presently before the Court is Petitioner's motion and memorandum to alter or amend the Memorandum Opinion and Order, and Judgment dismissing his habeas petition and granting Respondent's motion for summary judgment [Doc. 191]. Also before the Court is Respondent's motion to substitute counsel [Doc. 195] which is **GRANTED**.

In his motion to alter or amend, Petitioner asks the Court to reconsider a number of specific claims. For the reasons that follow, Petitioner's motion to alter or amend is **GRANTED IN PART** and **DENIED IN**

PART [Doc. 191]. The Court will address the claims as they have been listed in Petitioner's motion.

I. Claims Reviewed on the Merits

A. General Objections

Petitioner complains about the way the standard of review was worded in the Court's Memorandum Opinion. Petitioner suggests that 28 U.S.C. § 2254(d) does not limit this Court's jurisdiction to review habeas claims on the merits, but instead limits the granting of the writ with respect to claims adjudicated on the merits in state court. Petitioner also suggests the Court has the power to review state court decisions applying valid Supreme Court precedent under the "contrary to" language of § 2254(d)(1). Petitioner's general objections are rejected; the appropriate standard of review applicable to habeas corpus cases has been applied herein.

B. Claim 1

i.) Claim I.B.2 (Part 1)

Petitioner maintains the state court erred by barring Libby Woods's ("Woods") testimony. Woods proposed to testify that Petitioner's co-defendant, Ronnie Martin ("Martin"), had previously threatened the victim after she rejected his sexual advances. In addition, Petitioner claims the state court erred by barring the tape on which Martin admitted the

murders (hereinafter, "the Hunley tape").[1] Petitioner contends this Court's analysis of his claim was based on an incorrect interpretation of *Chambers v. Mississippi*, 410 U.S. 284 (1973). More specifically, Petitioner contends that *Chambers* was incorrectly viewed as only applying where a single defendant is charged or where the evidence exonerates a defendant. Petitioner is mistaken; the Court did not interpret *Chambers* in this manner.

Petitioner also complains that the Court overlooked that *Chambers* specifically holds mechanistic application of hearsay rules may violate due process. The Court however, did not mechanistically apply hearsay rules to the statements. Instead, it applied *Chambers* and determined the state court ruling that the Woods statement and Hunley tape were inadmissible during trial did not warrant habeas relief.

Petitioner next argues that the Court erroneously concluded that the Hunley tape is unreliable and lacks corroboration. Again, Petitioner is incorrect as is explained in the discussion which follows.

a) *Unreliability Finding*: Petitioner contends that, in ruling that the proposed evidence was not reliable, the Court overlooked that there was proof that corroborated the contested out-of-court statements on the tape. One source of corroboration, according to Petitioner, was his trial expert's

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[1] A conversation between Martin and Steve Hunley ("Hunley"), another inmate who was incarcerated with Martin, was surreptitiously taped by Hunley.

testimony, which rebutted the testimony of Dr. Blake, the State's expert, that the stabbings were committed by two people. However, the jury verdict demonstrates the jury credited the testimony of the State's expert over that of Petitioner's expert.

Petitioner also suggests that his own statements corroborate the evidence. The jury verdict reflects that the jury similarly did not credit Petitioner's testimony.

Further, Petitioner insists that Woods's proffered testimony and co-defendant Martin's statement that was taped by Hunley corroborate each other. There is nothing in the record to indicate the Hunley tape was reliable evidence.[2] Under the two-part corroboration theory advanced by Petitioner, when one part of the evidence fails the reliability test, the other one necessarily fails, since each part is dependent on the other.

b) *The Finding of Harmless Error*: Even if excluding the Woods testimony and the Hunley tape were errors, such errors are amenable to harmless error review. *Powell v. Collins*, 332 F.3d 376, 393 (6th Cir. 2003); *see also Wessener v. Straub*, 2004 WL 2203577, at *8-*9 (6th Cir. Sept. 16, 2004) (Petitioner

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[2] Petitioner has not directed the Court's attention to any evidence revealing the relationship between the declarant and the witness. It does not appear to be a spontaneous statement to a disinterested party because Hunley, the party apparently taping the conversation, is leading the conversation. Moreover, since Martin was effectively unavailable for cross-examination, there would not have been adversarial testing of the evidence—and this too bears on the issue of reliability.

claiming he was denied his right to present a defense was denied habeas relief even though district court found the exclusion of testimony violated his right to confrontation, because the district court found the error was harmless under *Brecht*). Under this standard, an error is harmless unless it "had a substantial and injurious effect on the jury's verdict[.]" *Id.* (citing *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)). If, however, a reviewing court "is in grave doubt as to the harmlessness of an error, the habeas petitioner must win." *Id.* (quoting *California v. Roy*, 519 U.S. 2, 4-5 (1996).

In this case, the Court has reviewed the record and does not find the alleged errors in excluding the proposed evidence had an injurious effect on the jury's verdict. As was explained in the Court's Memorandum Opinion, there is no question that the record showed that Petitioner participated in the kidnapping of the victims, raping of the teenage victim, and at the very least aided and abetted his co-defendant in the murders. Under the facts of this case, the alleged errors were harmless. Even if the evidence had been admitted, it would not have changed the facts the jury found or substantiated Petitioner's defense that he also was a victim because he was forced to participate in these crimes.[3]

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[3] Demonstrating that his co-defendant had a motive to murder does not support his defense that he was also a victim. As the state courts observed and the record fully supports, there were times Petitioner "could have gained the upper hand over Martin and brought the tragic events to a halt if he had been so inclined. As an alternative, he could have easily escaped to a neighbor's house for help if he was really as cowardly as

The fact that his co-defendant may have had a motive to commit the killings does not exonerate Petitioner.

B. Claim I.B.2 (Part 2)

Petitioner makes two primary arguments in his motion on this claim, each of which will be discussed separately.

a) *The Suppression Argument*: Petitioner argues, correctly, that part of this claim was not addressed in the Court's Memorandum Opinion, specifically that the trial court effectively suppressed the Hunley tape in the sentencing hearing. The Court will therefore proceed to address this claim by Petitioner.

It is important to understand the parameters of Petitioner's claim. The state trial court explicitly held that the Hunley tape was admissible during the sentencing hearing. Petitioner finds no fault with this ruling. The court, however, then held that the co-defendant's other statements would be admissible to rebut the Hunley tape evidence. This provisional ruling—that if Petitioner opened the door with the Hunley tape, the State could present evidence to rebut it—is the one which he challenges.

This position is unsound. The fallacy that inheres in Petitioner's position is that rebuttal evidence cannot

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represented. Those opportunities continued to occur after it became apparent, by defendant's own admissions, that Martin intended to kill both women." *State v. West*, 767 S.W.2d 387, 390-91 (Tenn. 1989).

be challenged on the basis that its proposed introduction forces defense counsel to make a decision, to wit, whether to open the door to its presentation. Petitioner's counsel was faced with the decision of whether to forego the presentation of the Hunley tape and thereby preclude the prosecution from offering the co-defendant's statements in rebuttal, or whether to offer the tape and risk that Martin's statements might damage Petitioner more than the Hunley tape helped him. *See Williams v. Woodford*, 384 F.3d 567, 621 (9th Cir. 2004) (finding that counsel's decision not to present evidence that would open the door to damaging rebuttal evidence was a reasonable strategy). Balancing the benefit to be derived from favorable evidence against the likely detriment posed by unfavorable rebuttal proof is a quintessential component of good lawyering. Counsel's strategic decision to forego the presentation of this evidence cannot now be charged to the trial court as error. *See United States v. Hall*, 653 F.2d 1002, 1006 (5th Cir. 1981) ("The underlying rationale [of rebuttal evidence] is that when the defendant has opened the door to a line of testimony by presenting evidence thereon, he cannot object to the prosecution's accepting the challenge and attempting to rebut the proposition asserted.") (citations omitted).

b) *The "Unreliability" Argument*: In addition to his "suppression" argument, Petitioner insists that by allowing co-defendant Martin's statements to be admitted **in their entirety**, his constitutional rights were violated because the remaining statements of Martin's (other than his remarks to Hunley) did not

meet the reliability standards of *Chambers v. Mississippi*, 410 U.S. 284 (1973). Petitioner offers several arguments in support.

First, Petitioner claims the conditional admission of the other statements made by Martin violated due process because it inhibited Petitioner from offering the Hunley tape.[4] Second, Petitioner claims the admission of Martin's other statements would have permitted unreliable evidence to be presented at sentencing. For example, Petitioner asserts that in Martin's videotaped statement to police he makes demonstrably false assertions, including that Petitioner had previously been in prison, had killed before, and was currently out on a quarter of a million dollars bond. The only statement that was reliable, according to Petitioner, is the statement he himself wished to present as evidence, i.e., the Hunley tape.

Third, Petitioner claims the admission of the other statements would have violated his confrontational rights. This is so, according to Petitioner, "because Martin could not be forced to testify, and entry into evidence of these statements without any court testimony of Martin would deny Stephen West the right to confront his accuser" [Doc. 111, p. 26]. Petitioner claims this ruling by the state court forced his trial counsel to "give up their defense or sacrifice

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[4] As discussed earlier, the decision not to present the Hunley tape was made by the defense, not the court. Due process does not prohibit the introduction of rebuttal evidence—even in a capital case, but, in some instances, may well require it. *Dawson v. Delaware*, 503 U.S. 159, 167 (1992).

their right to confrontation" [Doc. 111, p. 16]. Petitioner contends that, for all these reasons, the state court decision is contrary to or an unreasonable application of federal law or based upon an unreasonable determination of the facts.

Respondent presents several arguments in opposition to Petitioner's claims. First, Respondent suggests that the claim has been procedurally defaulted because Petitioner offers it under a different factual basis than the factual basis that sustained the claim in state court. Second, Respondent argues that, to the extent the habeas claim is construed on alleged violations of the Sixth and Eighth Amendments, as well as the rule in *Chambers*, it is supported by legal theories that are different from those that supported the claim in state court. Respondent insists that the claim raised in state court was predicated on alleged violations of the holdings in *Green v. Georgia*, 442 U.S. 95 (1979) and *Bruton v. United States*, 391 U.S. 123 (1968)—authority that is different from the rule in *Chambers*. Third, Respondent insists that the claim is without merit because the trial court, in fact, did not exclude the Hunley tape at sentencing.

To the extent the claim raised here involves the admissibility of the Hunley tape at sentencing, Petitioner has procedurally defaulted the claim, with the exception of those aspects of the claim which rely on *Green* and *Bruton* [Addendum No. 16, pp. 65-66]. On direct appeal, the Supreme Court of Tennessee addressed the claim as follows:

> The trial judge ruled that defendant could introduce the Hunley tape at the sentencing hearing, a ruling in accord with *Green v. Georgia*, 422 U.S. 95 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979). However, the trial judge also ruled that if defendant introduced the tape, the State could introduce the recordings of Martin's statements to the investigating officers wherein he incriminated defendant. Faced with that ruling, defendant made the decision not to introduce the Hunley tape and now attempts to label the trial judge's ruling as "effectively suppressing the tape," which he asserts to be reversible error. It would be a violation of fundamental fairness to permit defendant to introduce a hearsay statement favorable to him and preclude the State from introducing directly contradictory statements from the same declarant, neither party being able to cross examine the declarant. This Court will not countenance such basic unfairness and we find no merit to this issue.

State v. West, 767 S.W.2d 387, 398 (1989).

The state trial court did not exclude Martin's alleged confession during Petitioner's sentencing hearing. The state trial court ruled that Petitioner could introduce the Hunley tape, but, as discussed earlier, Petitioner chose not to introduce the tape because it would open the door to Martin's other statements.

The Supreme Court has "held that a capital defendant is entitled to introduce any relevant

mitigating evidence that he proffers in support of a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 114. . . (1982). However, "just as the defendant has the right to introduce any sort of relevant mitigating evidence, the State is entitled to rebut that evidence with proof of its own." *Dawson v. Delaware*, 503 U.S. 159, 167 (1992).

Petitioner and trial counsel made a tactical decision not to introduce mitigating evidence that would have opened the door to damaging evidence in rebuttal. Consequently, Petitioner is not entitled to habeas relief because the state court's ruling was not contrary to or an unreasonable application of federal law. Petitioner's claim that the Hunley tape was effectively suppressed during his sentencing hearing will be **DISMISSED**, and Respondent will be **GRANTED** summary judgment.

C. Claim II

Petitioner claims the Court incorrectly held that portions of his claim which relied on *Caldwell v. Mississippi*, 472 U.S. 320 (1985), had been procedurally defaulted and that, in addition, the Court's opinion overlooked the central holdings of *Caldwell*. More specifically, Petitioner complains that the Court found his challenge to the prosecutor's mitigating and aggravating arguments defaulted because they were not raised on direct appeal. Petitioner suggests the Court overlooked the fact that the Tennessee Supreme Court reviewed the arguments in question in the context of *Caldwell*. The Tennessee Supreme Court's opinion, however, quoted particular sections of the argument which

included the specific parts of the argument challenged by Petitioner. The state court included more of the argument than that challenged by Petitioner for contextual purposes because that was the only way for a reader to understand what was being challenged and why the court ruled as it did.

More specifically, before addressing the challenged portions of the argument, the Tennessee Supreme Court specifically noted that "[d]efendant expressly complains of the portions underlined above." *State v. West*, 767 S.W.2d 387, 399 (Term. 1989).[5] Moreover, the Tennessee Supreme Court analyzed only those portions of the argument raised by Petitioner, some of which it found violated *Caldwell*. Consequently, Petitioner did not raise for disposition in the state courts those arguments which this Court correctly found to have been procedurally defaulted. The state court did not analyze them, and this Court correctly found those arguments, *i.e.*, the challenge to the prosecutor's mitigating and aggravating arguments, to have been procedurally defaulted.

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[5] A typographical error was made in the Court's original Memorandum Opinion and Order [Doc. 188]. When quoting the prosecutor's argument, the section of the argument stating "it is one of the most serious you will ever make[,]" was inadvertently underlined and bolded. This section should not have been underlined and bolded. Rather, the following part should have been underlined and bolded, "it is not necessarily a difficult decision in that sense." However, the Court reviewed the portions of the claim that had been raised on direct appeal [Addendum No. 16, pp. 67-68] and did not find the *Caldwell*—based part of the argument to have been procedurally defaulted.

As to the arguments that *were* raised and decided in state court, this Court looked to the alleged improper comments made by the prosecutor which made the jury less responsible for imposing the death sentence. As the Tennessee Supreme Court found that certain comments did violate *Caldwell*, the Court determined that the trial judge had corrected any erroneous impression left by the prosecutor. The Court found the trial judge sufficiently corrected the statements that minimized the jury's role and that the state court's rejection of the claim was neither an unreasonable determination of the facts in light of the evidence nor contrary to or an unreasonable application of *Caldwell*. This claim was resolved in light of *Caldwell*, and the judgment will not be altered or amended.

D. Claim III

Petitioner mounts several challenges to the Court's disposition of Claim III. The Court will address each argument separately.

1. *The Affidavits*:

Petitioner objects to the Court's finding that the affidavits of Debra West Harless and Vestor West had not been fairly presented to the state courts and the resulting conclusion that, for this reason, they would not be considered. Petitioner suggests the Court "overlooked the fact that these affidavits were presented to the state court during state post-conviction proceedings along with the explanation that Vestor West just then agreed to confirm the abuse" [Doc. 191]. Petitioner is incorrect. The Court did not overlook the fact that Petitioner presented

these affidavits to the Tennessee appellate court; rather, Petitioner failed to bring to the Court's attention that he had done so.

Respondent, in his motion to dismiss and for summary judgment [Doc. 126], averred that Claim III.A was supported by documents, including the two affidavits presently at issue, which had not been presented in his brief to the Tennessee Court of Criminal Appeals, as support for Petitioner's ineffective assistance of counsel claim [Doc. 126]. When Petitioner responded to this motion, Petitioner failed to rebut the State's allegation that the affidavits were not relied upon in state court [Doc. 144]. Petitioner's entire response to the State's procedural bar argument relative to these two affidavits was "[a]ny additional facts included in the federal habeas petition are the product of Mr. West finally being afforded the resources necessary to litigate the claim and clearly serve to supplement and clarify the claim presented to the state court" [Doc. 144]. At the very least, once the State claimed these affidavits could not be considered by the Court because they had not been offered first to the state courts, it was Petitioner's burden to rebut the assertion, not the Court's. Put simply, if an assertion of procedural default is belied by the record, a petitioner must direct the Court to the parts of the record which reveal that, in fact, the issues (or here, the affidavits) were first offered to the state courts. This was not done in this instance.

Also troublesome is Petitioner's assertion that "[t]his motion was not rejected by the state court nor were the affidavits stricken from the state court record"

[Doc. 191]. In fact, the motion *was* denied by the state court, for these reasons:

> Counsel for the appellant has filed a motion to supplement the record with affidavits of witnesses who allegedly would have offered mitigating evidence at the sentencing phase of appellant's trial. As noted by the State in its response, however, the issue for which we granted appellant's application for permission to appeal is whether the evidence was sufficient to establish the aggravating circumstance that the murders were committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the appellant or another. Tenn. Code Ann. § 39-2-203(i)(6) (1982 Repl.) (Now codified at Tenn. Code Ann. § 39-13-204(i)(6) (1997 & Supp. 1998)). Moreover, as also noted by the State, it appears that the evidence was not first considered in the trial court.

West v. State, No 03S01-9902-CR-00017 (Tenn. April 27, 1999) [Doc. 194, Addendum No. 45].

This passage shows quite clearly that the affidavits were not fairly presented to the state courts because they were not submitted to either the state post-conviction trial court or the Tennessee Court of Criminal Appeals. While, technically, it may be true that the affidavits were not stricken, the Tennessee Supreme Court refused to consider the affidavits when it denied Petitioner's motion requesting the record be supplemented with affidavits of witnesses

who allegedly would have offered mitigating evidence at the sentencing phase of Petitioner's trial.

For the above stated reasons and the reasons stated in the Court's Memorandum Opinion and Order [Doc. 188], Petitioner's request to amend its earlier ruling on this claim is rejected.

2. *The West and Rutherford Affidavits*

Petitioner has another objection to the Court's decision with respect to the affidavit of Debra Harless-West, Petitioner's sister. Petitioner insists that this affidavit should have been considered, since the Court determined that it was substantially the same as her state post conviction testimony. Likewise, Patty Rutherford's affidavit should have been considered because the Court found that it supplemented her trial testimony. To the extent the affidavits duplicated or restated testimony offered at the state post-conviction hearing, they were cumulative. To the extent that the affidavits presented new facts, not first presented to the state courts, Petitioner did not meet his burden of proof to allow the Court to consider them as support for his claim of ineffective assistance of counsel.

3. *Documents and Other Affidavits*

Petitioner alleges that the Court made credibility findings by observing that Petitioner failed to present the remaining documents and affidavits to the state courts. To the contrary, the Court used the law on evidentiary hearings, 28 U.S.C. § 2254(e), as a template to determine that Petitioner did not meet the § 2254(e) requirements. Thus, it was necessary to

review the record and the affidavits to determine whether there was a reasonable probability that the outcome of the trial would have been different had counsel introduced this evidence. The Court made the determination required, but it made no credibility findings. Again, Petitioner has failed to meet his burden of proof which would allow the Court to consider this new evidence in reviewing his claim of ineffective assistance of counsel despite his procedural default.

The Court did not consider, in its analysis, an affidavit submitted by Dr. Keith Caruso, which Petitioner argues merely supplemented the testimony of his expert at the post-conviction hearing, Dr. Eric Engum. Petitioner suggests the Court was obliged to consider this affidavit. The Court disagrees. Dr. Caruso's affidavit testimony concerning Petitioner's mental state on February 23, 2001, is irrelevant to the legality of his confinement under a state court judgement entered on March 24, 1987.

Petitioner also argues that the Court should have considered a report submitted by Claudia R. Coleman, Ph.D ("Dr. Coleman"). Dr. Coleman performed a psychological evaluation on November 7, 2001, and based it, in part, on information that, apparently, was not provided to the Court, such as three statements purportedly made by co-defendant Martin; a TBI memo concerning those statements;

and Martin's arrest warrant.[6] It appears that Dr. Coleman used information to reach her opinion that was not provided to Dr. Engum.[7]

Another report which was not presented to the state courts but which Petitioner now insists should have been considered is one prepared by Dr. Richard G. Dudley Jr., M.D. ("Dr. Dudley"). Dr. Dudley performed a psychiatric evaluation on February 21, 2002, in connection with Petitioner's petition for post-conviction relief. Dr. Dudley's evaluation was also based in part on information that apparently was not provided to the Court, such as the statements purportedly made by Martin, Martin's arrest warrant, and affidavits of certain individuals.

To the extent the psychological examinations performed by Drs. Coleman and Dudley are essentially the same as the examination done by Dr. Engum, they are cumulative. Petitioner contends

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[6] Petitioner has not directed the Court's attention to the part of the voluminous record where these three items can be found, and the Court has been unable to locate them.

[7] Dr. Engum, Petitioner's state-funded expert, conducted extensive testing on Petitioner; submitted a detailed report; and gave detailed testimony at the post-conviction hearing. Dr. Engum concluded that Petitioner suffered from long-standing personality traits characterized by schizoid, avoidant, self-defeating and dependent features.

Dr. Engum was not provided with additional information regarding family background; academic background; psychosocial development; and medical, vocational and institution records; some of which it appears Drs. Coleman and Dudley did rely upon. [Doc. 111, Attachment K].

that, in reviewing his ineffectiveness claim, the Court should have considered the reports of Dr. Coleman and Dr. Dudley. These reports were not presented to the state courts. Dr. Coleman stated that the personality factors she found were "highly similar" to those found by Dr. Engum [Doc. 111, Attachment GG, p 6]. She further stated that, at the time of the offenses, Petitioner experienced "an overwhelming Acute Stress Disorder"; that he has developed Posttraumatic Stress Disorder ("PSTD") from that criminal episode; and that he continues to have residual symptoms of this disorder [*Id.*, p. 7]. Dr. Coleman concluded, overall, that, at the time of the crimes, Petitioner was suffering from "a mental disorder," which might have been relevant as a defense and/or a "mitigation issue" [*Id.*, p. 8].

Petitioner also complains that the Court disregarded Dr. Dudley's evaluation. He too concluded that, at the time of the crimes, Petitioner was suffering from a mental disorder. Dr. Dudley deduced that Petitioner suffered from PTSD. However, he differed with Dr. Coleman as to the cause of the PTSD, concluding, instead, that it had resulted from extremely severe childhood and early adolescent abuse and neglect [Doc. 111, Attachment HH]. Petitioner's own experts disagree as to the cause of the PTSD. Hence, this Court does not find that Petitioner's trial counsel was ineffective for failing to present mitigating evidence that Petitioner's own state post-conviction expert was unable to diagnose.

After hearing two experts, the state post-conviction court made credibility findings which may not be disturbed by this Court. By finding the Petitioner

had failed to carry his burden of showing ineffective assistance of counsel, the state court necessarily credited the testimony of the doctor who examined Petitioner prior to trial over that of Dr. Engum. Although Petitioner has not given the Court any basis to consider these reports, even if the reports of Drs. Coleman and Dudley were to be considered, this Court would have no basis upon which to determine that the state post-conviction court was unreasonable in finding one expert more credible than another, so as to find unreasonable its resulting decision on Petitioner's claim of ineffective assistance at sentencing. Moreover, neither report undermines the factual predicates of the state court's decision.

Next, Petitioner complains that the Court erroneously determined that trial counsel's decision not to introduce Petitioner's military record form DD-214 was a strategic decision since, according to Petitioner, counsel's reason for not introducing the form was specious.[8] Citing to *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000), Petitioner suggests that the Court overlooked the controlling precedent holding that the court must determine not whether counsel's choices were strategic, but whether they were reasonable. *Id.* at 481. Petitioner contends that the DD-214 contains nothing about drug and alcohol abuse, and thus, counsel's strategy was unreasonable.

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[8] Petitioner's trial counsel testified that the admission of the form would have been prejudicial because it reflected that Petitioner had a history of drug and alcohol abuse.

As the Court explained in its previous Memorandum Opinion and Order [Doc. 188], it appears that the DD-214 was arguably very prejudicial because the narrative reason for separation was: "MISCONDUCT-PATTERN OF MISCONDUCT." Had this document been introduced, then all of Petitioner's prior military misconduct, including Petitioner's previous drug and alcohol abuse,[9] would have been allowed before the jury. Based on the facts of this case, viewed as of the time of counsel's conduct, trial counsel's strategic choice was entirely reasonable. *Roe, supra,* at 477.

Petitioner argues that this Court failed to apply the controlling legal rule in *Strickland v. Washington*, 466 U.S. 668 (1984), by using the state post-conviction trial court's opinion to bolster that of the Tennessee Court of Criminal Appeals. This is critical, according to Petitioner, because the appellate court's decision was contrary to *Strickland.*

In its analysis of the claim, the post-conviction court first cited to *Strickland* and then proceeded to apply its principles. The state appellate court agreed with the lower court that, in light of the conflicting evidence, Petitioner had "failed to show how he was prejudiced by any acts or omissions of counsel." *West v. State*, 1998 WL 309090, *9 (Tenn. Crim. App. 1998). This Court applied *Strickland* in finding that the state court's resolution of the claim was not

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[9] Dr. Coleman's evaluation reflects Petitioner reported he abused alcohol and drugs while in the Army [Doc. 111, Attachment HH, pp. 4-5].

contrary to Supreme Court precedent and that its decision did not reflect an unreasonable determination of the facts before it. Although the Court also reached the conclusion that the disposition of the claim in state court did not involve an unreasonable application of *Strickland*, it did not make the finding explicit. The Court does so now and **AMENDS** its prior opinion to reflect this finding.

Petitioner also complains that the Court "mention[ed] at least three times that it has not seen medical records or any documentation of the abuse inflicted upon Mr. West" [Doc. 191]. In another eleventh-hour delivery, Petitioner attaches his medical records—not all of which are legible—to his motion to alter or amend. First, Petitioner has not pointed out which record contains evidence of abuse, and the Court has found no such a record. Secondly, these records were not fairly presented to the state court. In the absence of cause and prejudice (which has not been demonstrated), the Court cannot consider the records.

Petitioner also complains that this Court overlooked the fact that state post-conviction counsel were denied funding for expert services and were initially limited to paying Dr. Engum $1,200.00 to cover his preliminary evaluation of Petitioner. Again, Petitioner is incorrect. Petitioner was not denied funds for his expert; the state post-conviction court awarded $4,122.66 for Dr. Engum's services [Addendum No. 23, p. 264]. At any rate, these allegations were not presented to the state court and cannot be considered by this habeas Court due to Petitioner's failure to show cause and prejudice.

E. Claims V(A) - (C) & (E)

Turning to the prosecutorial misconduct claim, Petitioner has raised two complaints. First, Petitioner claims the Court failed to conduct a cumulative review of this claim. Petitioner is mistaken. Though not specifically saying that the alleged incidences of misconduct had been reviewed in the aggregate, this Court necessarily viewed the misconduct in the aggregate and as stated in the Court Memorandum Opinion and Order [Doe. 188], the Court reviewed the claim on the merits and found that the state court's decision on this claim was neither contrary to nor involved an unreasonable application of clearly established federal law. In addition, the Court determined Petitioner did not demonstrate the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court.

One alleged improper comment by the prosecutor was that the Petitioner disposed of the murder weapons or successfully washed blood off the murder weapons. The Court found such argument was proper based upon a reasonable inference from the evidence. Petitioner now objects to that finding. [*See* Doc. 188, p. 118]. Upon further review, the Court concludes this comment was not based on a reasonable inference to be drawn from the evidence, and thus it was arguably improper. Assuming the comment was improper, however, it was not "so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process deprivation." *Donnelly v. DeChristoforo*, 416 U.S.

637, 643-45 (1974). Furthermore, viewing all the alleged incidences of misconduct in the aggregate, the Court does not find that the comments so infected the trial that Petitioner's conviction was the result of a denial of due process. *Id.*; *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Accordingly, Court's decision with respect to this claim is **AMENDED** to reflect the above analysis.

F. Claim VII (A)

Petitioner has failed to present any evidence to persuade the Court that it erroneously denied relief on his claim that he was deprived of a fair and impartial jury trial when the state court declined to change the trial venue. Consequently, the Court will not amend its judgment on this claim.

G. Claim XII

In this claim, Petitioner questions the sufficiency of the evidence to show premeditation and deliberation. Petitioner complains that it was improper for the Court to conclude that he and his co-defendant were armed when they arrived at the victims' residence.

On direct review the Tennessee Supreme Court stated "[t]here was testimony that at about 4:00 a.m. Martin had stopped at John Allen's house and gone in and obtained a butcher knife from Allen." *State v. West*, 767 S.W.2d 387, 391 (Tenn. 1989). Although Petitioner disclaimed any knowledge that Martin had a butcher knife, the testimony identified by the Tennessee Supreme Court has not been disputed. Moreover, even assuming the co-defendants were not armed or that Petitioner did not realize Martin was

armed, that fact alone does not render the evidence insufficient to support Petitioner's first degree murder conviction. Consequently, there is no reason to alter or amend the Court's judgment on this claim.

H. Claim XVII

In this claim, Petitioner alleges he was denied a full and fair state post-conviction hearing. The Court determined his claim was not cognizable on federal habeas review. Petitioner's motion to alter or amend does not relate to *this* claim, but to the Court's alternate finding that the state court's decision that Petitioner had not demonstrated that the services of the investigators were necessary to establish a ground for post-conviction relief was contrary to or an unreasonable application of federal law, or an unreasonable determination of the facts. Even as to the alternative determination, however, Petition presents no evidence that persuades the Court to alter its conclusion with respect to the "full and fair hearing" claim.

I. Claim XXII

Petitioner next complains that the Court improperly excluded from its cumulative error analysis all claims which were not raised in his state petition to rehear. The Court conducted its cumulative error review on all errors found in state court. Since no additional errors were found on habeas review, there is no need to modify the judgment with regard to this claim.

II. Claims Deemed Time-Barred

A. Claim I (A)

In this claim, Petitioner alleges he was deprived of due process and an opportunity to present a defense at trial. Specifically, Petitioner's claim is that the trial court abused its discretion and prejudiced Petitioner's defense when it denied his motion for an expert to assist him in presenting his duress defense. He now complains that this Court was wrong to find his claim was time-barred. According to Petitioner, his allegation on direct appeal "where he alleges a deprivation 'of expert services to assist in the presentation of a complicated defense.' ... clearly calls to mind the decision of *Ake v. Oklahoma*, 470 U.S. 68 (1985), and alerted the state court to the federal constitutional issue" [Doc. 191]. Petitioner has failed to present any new information which requires this Court to amend its judgment on this claim.

B. Claim XIV (A)

This claim, which was presented in a motion to amend the original § 2254 petition, is that the death sentence is arbitrary because the jury could have imposed death without finding that Petitioner killed or intended to kill.

The Court determined that the subject claim was untimely because it did not relate back to Petitioner's original petition and further found that the requested amendment was futile. Petitioner has failed to present any additional information which persuades this Court to amend its judgment on this claim.

III. Unripe Claim

Petitioner agrees his claim that he is incompetent to be executed is unripe and was properly dismissed without prejudice. Nevertheless, he argues he provided factual support for this claim. When this claim has ripened, Petitioner may support it with any factual assertions he wishes. Until then, any argument of sufficient facts to support an unripe claim is irrelevant The judgment will not be amended on this claim.

IV. Claims Deemed Procedurally Defaulted

The Court determined that many claims had been procedurally defaulted. Petitioner now seemingly argues that the Court overlooked the mandatory authority which holds that a state court's failure to address the merits of a claim fairly presented to it does not preclude a finding of exhaustion. To the extent that this *is* his argument, such an argument is incorrect because all claims fairly presented to the state courts were analyzed under 28 U.S.C. § 2254(d) regardless of whether the state court addressed the claim on its merits. Therefore, his complaint is baseless.

A. Claim III (B)

Petitioner asserts the Court erroneously determined that a procedural default barred habeas review of his claim that, due to a conflict of interest, he had ineffective assistance of counsel. Petitioner has failed to present any evidence that warrants a change to the judgment with respect to this claim.

B. Claims III (D) (5), (6), & (7)

Petitioner argues that the Court incorrectly determined that he had procedurally defaulted his claims "that counsel was ineffective for failing to seek a charge regarding duress and coercion and mental disease or defect and for failing to adequately address mitigating factors" [Doc. 191]. Petitioner has failed to present any evidence to show that the determination of procedural default was incorrect.

C. Claim III (D)(D)

In this claim, Petitioner asserts that "[i]ndividually and cumulatively, trial counsel's errors fell below a reasonable standard of practice and prejudiced Stephen West" [Doc. 191]. The Court found the claim procedurally defaulted. Petitioner for the first time in response to the finding of procedural bar asserts "that this Court overlooked the fact that Petitioner informed the state court, `even if this court determines that these errors standing alone do not amount to ineffective assistance, in evaluating whether a petitioner has discharged the burden of establishing prejudice, a court must consider the totality of the evidence ...'" [Doc. 191].

The Court did not overlook this sentence. Rather, Petitioner failed to assert this single sentence as a basis for exhaustion in his response to the respondent's claim of procedural default. However, since this part of the state court record has been brought belatedly to the Court's attention, the Court will **AMEND** its previous opinion to reflect that this Court found no errors on the part of trial counsel not already found by the state courts. Consequently,

assuming that this claim was exhausted, none of the errors found to have been committed by trial counsel, viewed individually *and* cumulatively, entitles Petitioner to any habeas relief.

D. Claim V (G)

Petitioner alleged the prosecutor engaged in misconduct by misleading the jury on the concept of reasonable doubt and also by shifting the burden of proof to Petitioner. Respondent asserted this claim was procedurally defaulted. Petitioner responded that additional facts may be presented in federal court if they do not fundamentally alter the claim addressed by the state court and that, by applying this rule, his claim was exhausted. Petitioner now argues this claim was clearly reviewed by the Tennessee Supreme Court on direct review. In support of his position, Petitioner quotes the following from the Tennessee Supreme Court's opinion on direct review:

> Defendant contends that the trial judge erred in overruling his objection to a portion of the district attorney's rebuttal argument that defendant labels a misstatement of the law and an unconstitutional shifting of the burden of proof. Defendant has erroneously labelled [sic] the argument. The district attorney merely argued that the evidence at the scene of the crime indicated that more than one person was a participant and that unless defendant's explanation created a reasonable doubt he should be convicted.

State v. West, 767 S.W.2d 387, 397 (Tenn. 1989).

However, Petitioner fails to quote the complete paragraph where the Tennessee Supreme Court determined that the issue was waived or, alternatively, that it lacked merit. *Id.*

The evidence supported that argument. When the trial judge overruled defendant's objection he reminded the jury that it was argument, correctly charged the jury that the mere presence of a person at the scene of a crime does not make such person an aider or abettor and correctly charged the burden of proof. *Defendant waived this issue by not including it in his motion for new trial,* but considered on its merits, it is without substance.

Id. (emphasis added).

When the state court relies on an independent procedural ground in order to deny relief, its discussion of the merits of the claim will not disturb the procedural bar. *Scott v. Mitchell*, 209 F.3d 854, 865 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000); *White v. Schotten*, 201 F.3d 743, 750-51 (6th Cir.), *cert. denied*, 531 U.S. 940 (2000). The alternative holding does not require the Court to disregard the state court's finding of waiver, a procedural bar. *Harris v. Reed*, 489 U.S. 255, 264, n.10 (1989) (states need not fear making alternative holdings); *Coe v. Bell*, 161 F.3d 320, 330 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999).

Accordingly, the claim was procedurally defaulted, and the Court will not address its merits.

E. Claim VI

Next, Petitioner complains that the Court erroneously determined that his claim based on *Brady v. Maryland*, 373 U.S. 83 (1963), was procedurally defaulted. When Respondent alleged, in his dispositive motion, that Petitioner had procedurally defaulted his *Brady* claim, Petitioner responded that the procedural default doctrine did not apply to the *Brady* claim. The Court determined Petitioner's response was not supported by law. Petitioner failed to raise the *Brady* claim during his state post-conviction proceedings. Furthermore, in this Court, in his response to the State's motion to dismiss and for summary judgment, Petitioner did not direct the Court's attention to any proof to demonstrate that his failure to present this claim was due to the suppression of the *Brady* materials, rather than to his own neglect. *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (failure to challenge confession at trial amounted to independent and adequate state procedural ground which prevented habeas review absent a showing of cause and prejudice).

Prior to the submission of the instant motion to alter or amend and the attached affidavits (dated October of 2004), there is nothing in the record to demonstrate cause for the procedural default. In light of this new submission, the Court will **AMEND** its opinion with respect to this claim, but the Court does not find that a evidentiary hearing is warranted since Petitioner cannot demonstrate prejudice resulting from the default.

To determine whether Petitioner can demonstrate prejudice resulting from any default, the Court must determine whether Petitioner can show that the allegedly suppressed evidence is material for *Brady* purposes. A *Brady* violation consists of three elements which Petitioner must establish: (1) that evidence which was favorable to him; (2) was suppressed by the government; and (3) the suppression resulted in prejudice to the him. *Strickler v. Greene*, 527 U.S 263 (1999). In determining whether the evidence is material, the Court must evaluate the evidence in light of the cumulative effect of the undisclosed evidence. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434. To demonstrate the evidence is material, Petitioner must show "the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes." *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991), *cert. denied*, 504 U.S. 940 (1992). If the verdict is not worthy of confidence, then Petitioner is entitled to habeas corpus relief.

The first piece of evidence advanced by Petitioner as *Brady* material is a sheet of paper consisting of undated, handwritten notes without any identifying information as to the author of the notes [Doc. 111, Attachment W]. Presumably, the notes contain a recounting of statements made by Angela Sue

Duncan ("Ms. Duncan") to some law enforcement official. On the paper are these notations:

> Shelia and Ronnie went together Aug, Sept, Oct, 1985.
>
> Andera Cooper-possibly stayed the night with Ronnie also had sex.
>
> Shelia told Angela she had been been [sic] raped last summer. By way she talked it was Ronnie. Also told Ronnie had been calling her. On Thursday night before she was killed Ronnie called her and told her he would kill her if she did not go out with him.
>
> Junior McCoy-Shelia went with her [sic] after she & Ronnie had broken up. Junior and she broke up around Christmas. Lives around Norris.

[Doc. 111, Attachment W].

Petitioner claims that this evidence would have demonstrated that his co-defendant was more culpable than he; that it would have rebutted the allegation of premeditation; and that it would have mitigated the punishment.

At the time of trial, Petitioner was well aware that his co-defendant knew the victim and that he had made threats against her. Petitioner complained that the state trial court erred when it prevented him from introducing similar testimony from Libby Woods [Doc. 191]. Moreover, the uncontroverted evidence was that, while Martin knew the victims, Petitioner did not know them. The evidence before the jury was that Martin, not Petitioner, was

directing the events during this criminal episode. Therefore, the Court finds that the absence of this evidence did not deny Petitioner a fair trial and did not result in a verdict unworthy of confidence.

The statements the victim made to Ms. Duncan about Martin's threats are, in effect, double hearsay and could not be introduced to prove the truth of the statement. Petitioner has not explained how the statements could have been used during trial or to what admissible evidence the information could have led. This is not a situation where the evidence could have been used to impeach co-defendant Martin because Martin did not take the stand.

Petitioner maintains this evidence would have demonstrated that he did not premeditate the murder or aid and abet his co-defendant in premeditating the crime. Petitioner further maintains that this evidence would have mitigated his role in the offense. However, any indication that Petitioner's co-defendant was the leader of this crime spree supports the evidence already considered by the jury. The jury heard evidence that Martin was the one who knew and who had some type of prior relationship with the victims. This information does not exculpate Petitioner; it merely inculpates his co-defendant who is presently serving sentences for these crimes. This evidence is not inconsistent with the evidence introduced during the trial or with the state's theory of guilt. Even if the evidence established that Martin devised the murder plan, Petitioner would still be eligible for the death penalty based on his participation in the rape and murders.

Accordingly, the Court finds that Petitioner has failed to prove that this is material evidence for *Brady* purposes; thus, he cannot show prejudice resulting from any default to excuse his procedural default.

The second piece of evidence advanced by Petitioner as *Brady* material is a sheet of paper consisting of handwritten notes, again without any identifying information as to the date or author of the note [Doc. 111, Attachment X]. Presumably, this particular note contains statements John Athen Varnell ("Mr. Varnell") made to some law enforcement official. The note is somewhat confusing, in that the name John Allen appears at the top of the note. Underneath that name is the name of Mr. Varnell, along with his contact information. This is what is written on the note:

> About 2 mos ago Ronnie and John on the spur of the moment went to Tucker Georgia and visited Tod Schubert a step brother. They never saw him. Ronnie later that day wanted to go to Calf. [sic] About 3 wks ago at Saw Mill Cove Ronnie talked about hijacking cars and killing people to get to where he wanted to go.
>
> Ronnie has also talked about Satan Worship. Also about rock groups and satan.
>
> ...
>
> Ronnie & Shelia did go together a couple of years ago.

> Sharon Carter - moved to Fla. Ronnie had sex with her. Went together & she broke it off. She got married. Now hates her.

[Doc. 111, Attachment X].

Petitioner has not explained how the suppression of this information prejudiced him. This evidence does not exculpate Petitioner. It is not inconsistent with the State's evidence or the State's theory of guilt. Petitioner has not demonstrated—and the Court does not find—that this evidence has any impeachment or exculpatory value. Consequently, the Court finds this evidence is not material for *Brady* purposes. Because the evidence was not material, Petitioner cannot show prejudice to overcome his procedural default.

Petitioner's third piece of claimed *Brady* evidence is what appears to be the second page of handwritten notes. These notes, likewise, are undated and contain no identifying information as to the author of the notes [Doc. 111, Attachment Y]. The notes on this sheet of paper reflect that Martin had a good reputation at school until the year of the interview. The notes also indicate that Martin talked about the rock group AC-DC a lot, and that Sherry Stooksbury, a sixteen-year-old girl who lived in Norris, Tennessee, said that she had seen Ronnie cut up a cat and other animals and throw them around outside of the school building [Doc. 111, Attachment Y]. It is not clear how this evidence would exculpate Petitioner. Nothing in this document indicates Petitioner was prejudiced by not having this information. Petitioner has not shown that disclosure

of this item would have led to the discovery of other admissible evidence. Accordingly, this evidence is not material and does not demonstrate prejudice sufficient to excuse his default.

Next, Petitioner claims the information from Dan Farrell and James Housely reveals that the day of the crime, Martin was packing his belongings and that he said he was going to Florida. According to Petitioner, this information would have been very useful at sentencing, since the jury found the aggravating factor that the murders were committed to avoid arrest or prosecution. Furthermore, Petitioner argues, this information could have led the jury to believe that Martin was the ringleader and Petitioner had simply gone along with Martin's plan. The record before the jury supported this argument, and this evidence therefore would have been cumulative. Not only would this new information have been cumulative, but it was in no way exculpatory of Petitioner. Thus, it is not material, is not *Brady* evidence, and does not provide prejudice sufficient to excuse Petitioner's default.

Petitioner's last piece of alleged *Brady* evidence is a certain report relative to the mental health of his co-defendant. Petitioner claims that the record which reveals Martin to have been an angry young man, a skillful manipulator who had thoughts of violence toward people who frustrated his desires, shows that Petitioner is innocent of the crimes for which he was convicted, or at least bears diminished responsibility for those crimes. Regardless of the personality of Petitioner's co-defendant, this information does not exculpate Petitioner. Evidence inculpating

Petitioner's co-defendant does not tend to show Petitioner's innocence. This evidence is not favorable to the defendant; rather, it is unfavorable to the co-defendant. Accordingly, the Court concludes it is not material.

Taken together, the Court concludes that the evidence at issue did not affect the verdict. The alleged *Brady* material does not exculpate Petitioner; it only bolsters the proof that Petitioner's co-defendant was the leader. This evidence does not undermine the jury's verdict. The Court concludes that the absence of the alleged exculpatory material did not have a cumulative effect of depriving Petitioner of a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434-436 (1995). Thus, since the Court concludes Petitioner has not demonstrated that the alleged favorable evidence could not reasonably be taken to put the whole case in such a different light so as to undermine confidence in the verdict, the Court finds that these documents are not material for *Brady* purposes. Consequently, Petitioner has not demonstrated prejudice sufficient to excuse his default and thus is not entitled to any habeas relief on this claim.

V. Claims Deemed Raised Only as Violations of State Law

A. Claim I(D)

Petitioner complains that the Court erroneously determined that this claim (alleging the prejudicial effect of the prosecutor's use of inaccurate and misleading demonstrative exhibits), was raised in state court solely as a state law error. This Court also found, in the alternative, that Petitioner had not shown that the state court's disposition of his claim was contrary to or an unreasonable application of Supreme Court precedent. Petitioner has failed to present any additional information which justifies any reconsideration of this claim.

B. Claim I(F)

In Petitioner's final argument, he asserts the Court incorrectly found his claim (regarding the prosecutor's improper questions about Petitioner's wife being fearful of him) had been raised in state court solely as a state matter. In his habeas application, Petitioner identified this claim as a failure to grant a mistrial. The Court made an alternative finding that the state court's decision was neither contrary to or an unreasonable application of Supreme Court precedent. Petitioner has failed to present any additional information which justifies any reconsideration of this claim.

VI. Conclusion

In conclusion, Petitioner's motion to alter or amend is **GRANTED IN PART**, but only to those claims specified in this Order and Supplemental Report,

and **DENIED IN PART**, with respect to all other claims. The Memorandum Opinion and Order, and Judgment entered on September 30, 2004 [Docs. 188 & 189], shall remain the same in all other respects and are fully incorporated herein by reference.

SO ORDERED:

ENTER:

s/Thomas A. Varian
UNITED STATES DISTRICT JUDGE

Appendix D

COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE.

STEPHEN MICHAEL WEST

Appellant,

v.

STATE OF TENNESSEE

Appellee.

No. 03C01-9708-CR-00321.

June 12, 1998.
Rehearing Denied July 22, 1998.
Permission to Appeal Granted Feb. 8, 1999.

OPINION

SUMMERS.

The petitioner was convicted of two counts of first degree premeditated murder, one count of aggravated rape, and two counts of aggravated kidnapping. He was sentenced to death. His convictions and sentences were affirmed by the Tennessee Supreme Court. *State v. West,* 767 S.W.2d 387 (Tenn. 1989). These brutal murders were committed by the petitioner and another individual, Ronnie Martin, whose case was severed. At the petitioner's trial, his defense was that he was forced by Martin to engage in the crimes and could not get away from Martin although the appellant was bigger and taller than Martin and was Martin's supervisor at a fast-food restaurant. The motive of the crimes was sex and money. The petitioner gave

varying accounts of what had happened and blamed Martin for the crimes. The petitioner was represented at trial by two lawyers, Mr. McConnell and Mr. McAlexander.

In 1990, the petitioner filed a post-conviction relief petition alleging ineffective assistance of counsel, prosecutorial misconduct and trial court errors, and challenging the constitutionality of the Tennessee death penalty statute. Judge John K. Byers, Senior Judge, held hearings in September and October 1996 on the petition. In April 1997, the hearing court entered comprehensive findings of fact and conclusions of law in denying relief requested in the petition. Following the appropriate appellate procedures, petitioner appealed to this Court. We heard oral arguments on March 24, 1998.

The issues for review can best be summarized as follows:

I. Should the petitioner's death sentence be vacated because he was denied effectiveassistance of counsel at the sentencing hearing?

II. Should the petitioner's case be remanded for a new sentencing hearing because the evidence does not support the aggravating circumstance that the petitioner's actions were committed to avoid arrest or prosecution?

III. Should the petitioner's convictions be set aside because the trial judge did not charge applicable lesser offenses?

IV. Did the post-conviction relief trial court err regarding petitioner's motion for defense services?

We affirm the judgment of the post-conviction court which denied relief.

THE EVIDENTIARY HEARING

Dr. Eric Engum, a clinical psychologist, conducted a two-hour evaluation of the petitioner in December 1995. Dr. Engum testified that his tests did not indicate any sign of brain damage or any type of "cognitive compromise." Petitioner's intelligence was within normal limits. The petitioner suffers from depression and mixed personality disorder, both of which are of a long-standing nature. Dr. Engum stated that the petitioner was "somewhat unstable, moody, and changeable." He had a poor home life and home environment.

The psychologist testified that the results of the Minnesota Multi-Phase Personality Inventory indicated that the petitioner had a lot of anger resulting from earlier childhood experiences. Dr. Engum's opinion was that the petitioner could be submissive and was functioning at an emotional level less than his chronological age. Dr. Engum opined that the test results would have supported the thrust of the defense of the petitioner at the guilt phase of the trial, that the codefendant dominated and controlled the petitioner "who was acting under a form of duress." Dr. Engum concluded that the petitioner suffers from a condition characterized as extreme emotional disturbance.

Dr. Engum compared his findings to that of Dr.

Bursten, a psychiatrist who had been used during the initial trial of the petitioner. Dr. Engum described how the petitioner had told Dr. Bursten that during the incident he could not do anything about the crimes perpetrated upon the victims. Dr. Engum then stated that Dr. Bursten had been employed during the initial trial to conduct a sanity and competency evaluation, which was different from the neurological assessment that he had conducted.

On cross-examination, Dr. Engum admitted that in the twenty cases in which he had testified as an expert, he had testified for the defense. Dr. Engum stated that the petitioner had told him that he had no recollection of any events in his life before the age of ten. The doctor admitted that the petitioner had been asked by Dr. Bursten if he had ever encountered any abuse, and the response had been "No."

Debbie West, sister of the petitioner, testified that she was the oldest of four siblings. She stated that the petitioner's mother had had an affair in 1961 and that the petitioner had been born in a mental institution in 1962. Ms. West testified that in 1964 the petitioner had "been knocked cross-eyed" by being thrown against the wall of the family home. She testified that the petitioner also had been slapped in the head and hit with shoes. She said that the petitioner had been abused throughout his childhood.

Ms. West testified that her father has been an alcoholic since he was ten years old and that he is a violent man. She stated that the petitioner would

flinch when either his mother or his father came toward him. She then stated that she had not spoken with the petitioner in ten years.

When questioned about her participation in the sentencing phase of her brother's trial, Ms. West stated that she had told Mr. McConnell, trial counsel, about the abuse suffered by the petitioner. Mr. McConnell told her that this information was not relevant because the petitioner's parents were paying his fee. Therefore, they would not admit to anything. She stated that she would have testified concerning the abuse if she had been asked about it when she took the witness stand.

On cross-examination, Ms. West admitted that when she was questioned during the sentencing phase of the trial as to whether there was ever any problem between the petitioner and the rest of the family as far as discipline, she had replied, "No." She admitted that at the sentencing hearing she had testified that the petitioner had lived with her and that he had never been involved in any trouble but that in actuality, the petitioner had experienced a problem with drugs and alcohol. She stated that she had not informed the court of his problems or information concerning abuse at the sentencing phase because she was not asked specific questions. Also, her mother was on the verge of a heart attack at the initial trial, and she did not think it would benefit the petitioner to tell things that would harm her mother.

The next witness, Mr. McAlexander, co-counsel in the petitioner's trial, was called, out of order, to

testify for the state. Mr. McAlexander testified that he had been licensed to practice law in 1986 and that he had been contacted by Mr. McConnell, chief counsel in the petitioner's trial, to assist him in the case. He initially reviewed files and conducted investigations. He had done a tremendous amount of research in preparing motions filed by the petitioner. He had met with the petitioner's family on numerous occasions during the pendency of the trial and he had participated in everything that occurred in the case after he was appointed co-counsel. He stated that he had handled the motion for new trial, the appeal, and the suppression motion in the case by himself. His total time spent was 547.4 hours.

Mr. McAlexander testified that he did not remember Ms. West, the petitioner's sister, ever alleging that the petitioner had been abused during childhood. He also could not recall that the petitioner ever alleged any type of abuse. He stated that he had not received as much cooperation from the petitioner's family as he would have liked.

On cross-examination, Mr. McAlexander testified that he had no experience as a trial lawyer in defending capital cases. He admitted that he knew Mr. McConnell, like himself, had never had any experience trying a capital case. He recalled that Mr. McConnell had experienced difficulty with his fee because he had been retained and that he had made the statement that Mr. McAlexander, a court-appointed attorney, was getting paid more than he was getting paid as a retained lawyer.

Mr. McAlexander admitted that Mr. McConnell

had consulted Dr. Ben Bursten regarding a sanity and competency evaluation. As a result of the evaluation, the petitioner had attempted to introduce a duress defense through expert witness testimony. The trial court rejected the request for expert services because Mr. McConnell had earlier objected to a court-ordered evaluation of the petitioner at Middle Tennessee Mental Health Institute. Mr. McAlexander also testified that a suppression hearing concerning inconsistent statements by the petitioner had been conducted and that he had requested that the hearings be transcribed. However, at the time of the trial, the hearings had not been transcribed.

On redirect examination, Mr. McAlexander recalled that the issue concerning hiring a defense expert on the duress defense was raised on appeal, and the Supreme Court ruled that this testimony would not be admissible anyway. The Supreme Court also compared the transcript of the suppression hearing with that of the trial transcript and concluded that there were no overlooked opportunities for impeachment.

Mr. McConnell, chief counsel for the petitioner, was called by the petitioner to testify. He had been paid $10,000 by the petitioner's family for his representation. In addition, several thousand dollars were paid by the family to investigators and Dr. Bursten. He admitted that when he learned that his co-counsel was paid $20,000, he had not been happy. He also admitted that at the time of the trial, he had never handled a capital case involving the death penalty. He admitted that he had requested

additional funds from the petitioner on numerous occasions but that he had not been paid these funds.

Mr. McConnell claimed that he had made a complete investigation into the petitioner's life. Records were introduced into evidence to show that Mr. McConnell had waited to subpoena the school records of the petitioner until the second day of the trial. Counsel admitted having no recollection of obtaining any employment records, birth records, medical records, or military records of the petitioner. He further admitted that he "wouldn't have wasted any time" on conducting interviews of siblings for the purpose of exploring mitigation themes because the petitioner had never raised those issues.

Mr. McConnell recalled that Dr. Bursten had been employed to conduct a sanity and competency evaluation. Mr. McConnell admitted that he had filed a motion in opposition to a court-ordered competency evaluation. After the state's motion was denied, Mr. McAlexander filed a motion to obtain expert services for a "duress defense." This motion was denied.

Mr. McConnell admitted that he had been allowed to withdraw from this case while the motion for a new trial was pending. His co-counsel was going to handle the appeal, and Mr. McConnell's practice had suffered economically as a result of this case. He further testified that his theory at the guilt phase of the trial had been that although the petitioner was at the scene of the murders, his codefendant had actually committed the murders. At the penalty phase, counsel had attempted to show

that the petitioner was a veteran, that it would be an extreme hardship on his wife and new baby without him, and that the petitioner was a young man with no prior record. Mr. McConnell stated that he had attempted to appeal to the common sense, decency, and sympathy of the jury.

On cross-examination, personal diaries Mr. McConnell kept during his representation of the petitioner were entered into evidence. Mr. McConnell recalled interviewing family members of the petitioner, especially the petitioner's mother and one of his sisters, Deborah Adams. He testified that at no time during his interviews with Ms. Adams did she make him aware of any abuse suffered by the petitioner in his early years. He testified that the family had told him that the petitioner had come from a happy family.

Mr. McConnell testified that he had employed two private investigators to check out whether the petitioner's codefendant had been involved in a cult. One of the investigators had also attempted to measure the prejudice in the community against the two alleged perpetrators of the crime.

On redirect examination, Mr. McConnell was questioned concerning a press interview he had given about the case in his initial representation during which he had mentioned that a satanic cult might be involved. He responded that he had intended to show that it was the petitioner's codefendant who might have had an involvement with a cult.

Mr. Jerry Summers, a seasoned Tennessee

attorney who has participated in many criminal trials, capital and noncapital, testified that he had been asked by post-conviction counsel to review the record in this case. Upon his review, Mr. Summers' opinion was that counsel's performance in this case fell below the range of competence required of attorneys in death penalty cases. Specifically, he stated that Ms. West's testimony that the petitioner was born in a mental institution would have been a red flag. He stated that he would certainly have talked to others besides family members in determining a defendant's background. Family members might not always be truthful because of embarrassment or shame.

Mr. Summers' opinion was that the standards for defending a death penalty case would require counsel to obtain a psychological evaluation other than a sanity and competency evaluation, especially considering the facts of this case. He opined that Dr. Engum's report would have been extremely valuable at the sentencing phase of the trial because it indicated that the petitioner suffered from specific emotional problems. The report would have supported certain mitigating factors such as: that the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance, that his participation in the murders was relatively minor, and that the defendant acted under extreme duress and under the substantial domination of another.

Mr. Summers testified that the petitioner's failure to remember anything concerning events in his life before the age of twelve or thirteen should

have been an indicator that he was attempting to block out certain events from that time period. Mr. Summers would not have waived jury instructions on lesser included offenses, as counsel did, because jurors might want to help someone if they think that person was less culpable than someone else. In conclusion, Mr. Summers testified that it was his opinion that the attorneys' performance fell below the range of competence required of capital case attorneys in that they did not conduct a proper investigation, did not conduct thorough interviews, and did not get a psychological evaluation.

On cross-examination, Mr. Summers admitted that a lawyer could make a strategic decision not to have a psychologist examine the defendant if he had previously been examined by a psychiatrist. However, he further opined that the red flags in this case would have led counsel to further investigation rather than accepting the petitioner's and the family's word.

Patricia Depew, another sister of the petitioner, testified that she had grown up in the same house with the petitioner as a child. She recalled physical and verbal abuse of herself and the petitioner. She testified that the petitioner had reacted to the abuse by becoming passive. When questioned about whether she had ever spoken with petitioner's trial counsel, she stated that she had just spoken with her mother about the case. She recalled that she had attended some of the meetings between her mother and counsel but that counsel had never asked her any questions. When asked why she had not told the attorneys about the abuse, she stated that nobody

had asked and she had not thought that it was important. On cross-examination, Ms. Depew stated that she had been in New Mexico the five years before the petitioner's arrest.

Ruby West, the petitioner's aunt, testified that she had lived upstairs from the petitioner's apartment when he was a child. She said that petitioner's parents were abusive. The petitioner's mother would swear at him, beat him, and would put him in a cold room with a mattress wet with urine. She recalled one occasion when the petitioner's mother got angry at him and threw him against the wall by his feet. She recalled several incidents of abuse. She also stated that the petitioner's father had participated in some of the abuse. She then stated that she had never been contacted by petitioner's counsel at the time of his trial.

On cross-examination, Ms. West testified that she had been contacted by her husband, brother of the petitioner's father, and asked if she would testify as to the abuse the petitioner had experienced as a child. She stated that at that time she was living in Ohio but had since moved back to Tennessee. The petitioner's brother had approached her and asked if she would be willing to testify as to the abuse. She told him that she would rather not get involved; but when Patty, the petitioner's sister, came to see her, she told her what she remembered.

Ms. West testified that the petitioner had reacted to the abuse by becoming very timid and frightened when he saw his parents coming. She stated that he always appeared undernourished.

When she was confronted with the statement that the petitioner had made at trial that he had a close relationship with his family and that they "all still love[d] each other a lot," she stated that maybe things had changed. She stated that she had been away and that she had only been around the family closely when the petitioner was small.

The petitioner's next witness was Paul Morrow, an attorney who has been actively involved in capital case litigation since 1989 when he was employed with the Capital Case Resource Center of Tennessee. Mr. Morrow testified that there are standards by which capital cases are governed and that they are contained in the United States Supreme Court opinions. He elaborated concerning the differences in capital case representation and explained that specialized training is definitely required before accepting the representation of defendants charged with capital offenses. One of the primary differences in death penalty litigation is that an individualized sentencing hearing must be held which requires a second trial. An attorney must present to a jury the background of the defendant, the defendant's character, and anything that might permit the jury to render a sentence less than death. Mr. Morrow stated that the investigation should entail searching and pulling birth records, school records, medical records, military records, and institutional records and that from these records the attorney should be able to "ferret out" someone who could talk about the development of the defendant. Additionally, he stated that extensive interviews needed to be conducted, starting with the defendant. He added

that if abuse is a factor, however, usually the defendant is the worst person to talk to because he or she is usually embarrassed or does not understand its significance.

When questioned as to the experience of counsel in this particular case, Mr. Morrow testified that Mr. McAlexander was a new lawyer and that Mr. McConnell had come from a state that did not have the death penalty, so counsel should have at least contacted other attorneys who had represented persons charged with capital offenses. They should have consulted materials that were readily available, such as the Capital Death Penalty Manual created by the Tennessee Association of Criminal Defense Lawyers. Mr. Morrow then stated that counsel's investigation in this case did not fall within the range of competence demanded of attorneys in death penalty cases.

Mr. Morrow also stated that counsel was deficient in not requesting a psychological evaluation, at least for mitigation purposes. He emphasized the importance of Dr. Engum's psychological report which would have led him to investigate the development of childhood abuse. He differed in Mr. Summers' conclusion that counsel was most deficient in the sentencing phase because it was his opinion that the psychological evaluation would have been extremely important in the guilt phase of the trial as to intent and diminished capacity. In conclusion, he testified that the prejudice that was shown in this case was that the jury did not hear the "psychological or lay witnesses that would have made somewhat comprehensible his actions on that day [day of the

murders]." On cross-examination, when questioned as to the heinous nature of the crimes and as to whether any mitigation would have made a difference, Mr. Morrow stated that mitigation absolutely demands an explanation because a competent attorney must give the jury at least something.

The petitioner concluded his proof, and then Dr. Ben Bursten testified for the state. He was allowed to testify as an expert witness. He had examined the petitioner and conducted a forensic evaluation requested by counsel. Dr. Bursten stated that he had determined that the petitioner was competent to stand trial and that he could not support an insanity defense. He testified that during the evaluation the petitioner had definitely stated that there had been no childhood abuse in his family life. He admitted that he had not questioned the immediate family about abuse because they had told him that he was the most lovable of all the children. He stated that he had evaluated Dr. Engum's report and that he disagreed that the evaluations conducted indicated any type of abuse. He also testified that he disagreed with Dr. Engum that the effect of the abuse caused extreme emotional disturbance. In conclusion, Dr. Bursten stated that within a reasonable degree of medical certainty, he would not agree with Dr. Engum's assessment.

On cross-examination, Dr. Bursten testified that he was being paid by the state for his testimony as an expert witness. He admitted that he had had no contact with the petitioner since 1986. He admitted that he had contacted Mr. McConnell to obtain his

permission to speak with the district attorney general.

I.

The petitioner cites numerous cases for the contention that one of counsel's primary duties is to investigate and pursue the angles of defense, whether representing the client at trial, at sentencing, or on appeal. *State v. Melson,* 772 S.W.2d 417, 421 (Tenn. 1989); *Baxter v. Rose,* 523 S.W.2d 930 (Tenn. 1975); *Cooper v. State,* 847 S.W.2d 521, 527 (Tenn. Crim. App. 1992). The petitioner asserts that this investigation is especially essential at the sentencing phase of a capital trial. *Cooper,* 847 S.W.2d at 531. However, the petitioner also acknowledges that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington,* 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The petitioner contends that defense counsel's failure to investigate the petitioner's background fell far outside the range of competent assistance because the only mitigation proof was the testimony of six character witnesses that the petitioner was a well-behaved and generally liked person. The petitioner contends that his attorneys were deficient in failing to conduct any investigation into his background, educational and emotional condition, and family relationships in order to present

mitigation. The petitioner emphasizes that counsel did not conduct a records search.

The petitioner faults counsel for conducting interviews of only his parents and one sister. None were questioned concerning possible abuse. The petitioner cites specific instances of abuse as reflected in the post-conviction hearing transcript. The petitioner also faults counsel for failing to have a comprehensive psychological examination. He argues that the choice not to put on evidence at the sentencing phase of the hearing cannot be defended as trial strategy because the record indicates that counsel completely failed to conduct a thorough investigation.

The petitioner cites *Goad v. State,* 938 S.W.2d 363 (Tenn. 1996) and *Adkins v. State,* 911 S.W.2d 334 (Tenn. Crim. App. 1994) as two Tennessee cases which demanded resentencing due to counsel's failure to conduct an adequate investigation into the petitioner's life. The petitioner then recounted the testimony of Mr. Summers and Mr. Morrow.

The state cites *Lockhart v. Fretwell,* 506 U.S. 364, 369-70, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) for the following proposition:

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

The state argues that the petitioner has failed to meet his burden of proof as to counsel's ineffectiveness at the sentencing hearing. The state contends that counsel obtained the petitioner's military records and made a deliberate decision not to introduce such evidence because it contained information showing that the petitioner had a background of drug and alcohol abuse. The state argues that counsel's failure to obtain school records was not per se ineffective because prejudice was not shown by the petitioner. The state argues that counsel's failure to obtain medical records was not per se ineffective because the petitioner did not produce such records at the post-conviction hearing which could have been introduced at trial.

Regarding the lack of a comprehensive psychological evaluation, the state argues that the testimony of Dr. Bursten was of crucial importance in this case. Dr. Bursten disagreed with expert witness Dr. Engum in that Dr. Bursten would not agree that the petitioner was an abused child. When asked to assume that the petitioner had been abused, Dr. Bursten disagreed with Dr. Engum's conclusion that the abuse would cause extreme emotional disturbance. The state argues that counsel was not ineffective for failing to uncover nonpsychological evidence of abuse because counsel had never been made aware of such abuse during interviews with the family.

We agree with the post-conviction court's assessment that "there existed conflicting testimony regarding mitigation evidence that trial counsel failed to present." We also agree with the court that Dr. Engum's testimony reflected that the petitioner's evaluation showed no signs of trauma or organic brain damage. We agree with the post-conviction court that in light of this conflicting evidence, the petitioner did not meet his burden with respect to the allegation of ineffective counsel at the sentencing phase. Regarding all of the ancillary and subissues, after a thorough review, we conclude that the petitioner has failed to meet his burden of proof as to these allegations. We agree with the post-conviction hearing court that the petitioner has failed to show how he was prejudiced by any acts or omissions of counsel.

II.

The petitioner asserts that during the sentencing phase of his trial, the state failed to "submit even a single piece of evidence from which any rational trier of fact could infer that the petitioner acted in order to avoid prosecution." The petitioner asserts that the post-conviction trial court failed to address this issue in its Memorandum of Law. Petitioner argues that this issue is not waived because "[a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice." Tenn. R.Crim. P. 52(b).

The state asserts that this claim has been waived by the petitioner's failure to present it at trial and during the direct appeal. *See* Tenn. Code Ann. § 40-30-112(b) (repealed 1995). The state argues that the petitioner's attempt to introduce the plain error doctrine into a post-conviction proceeding such as this has been specifically rejected by this Court. *See State v. Sandy Eugene Womack,* No. 01C01-9003-CC-00077 (Tenn. Crim. App. at Nashville, July 26, 1990).

The state also argues that the evidence adduced at the trial clearly supported this aggravating factor because it was established that the petitioner's codefendant was known to one of the victims. The petitioner and his codefendant were in the victim's home for a substantial period of time, the codefendant was wearing a restaurant uniform that would identify him, and a concerted effort had been made by the petitioner and the codefendant to wipe fingerprints from the weapons that had been handled.

We agree with the state's position on waiver. The claims advanced by the petitioner could have been raised on direct appeal but were not. The petitioner has fostered no basis for overcoming the waiver provision found in the applicable post-conviction statute. Therefore, this issue is without merit.

III.

The petitioner argues that because the issues in this case revolved around his level of involvement in the murders, a second degree murder charge was indispensable. He asserts that the trial court was required by law to instruct the jury on the lesser

included offenses of first degree murder, regardless of whether he was requested to do so or not. *See State v. Ruane,* 912 S.W.2d 766, 782 (Tenn. Crim. App. 1995). The petitioner also asserts that trial counsel was ineffective for verbally waiving an instruction for second degree murder, especially since the record did not reflect that the petitioner himself voluntarily and knowingly waived the right to such an instruction. The petitioner argues that this issue should have been raised at the motion for new trial or on appeal. Again, the petitioner cites Rule 52(b) of the Tennessee Rules of Criminal Procedure in support of his nonwaiver claim.

The state argues that the decision to forgo instruction on lesser included offenses was a strategic decision of counsel and did not constitute ineffectiveness. The state cites the trial record whereby counsel informed the court that it was the defendant's position that he did not wish the court to consider any lesser included offenses in his charge. At the post-conviction hearing, the petitioner failed to examine his attorneys concerning their decision to forgo instruction on lesser included offenses. The state asserts that the petitioner's decision to relinquish further instruction on lesser included offenses was made in light of the evidence at trial and the defense theory that the petitioner did not commit the murders.

The allegation regarding lesser included offenses is presented for the first time at the post-conviction stage. A complaint about failure to charge a lesser included offense is not a cognizable claim on post-conviction review. Only constitutional errors can be

grounds for relief, and normally the failure to charge a certain offense does not violate the constitution. Moreover, the petitioner has failed to rebut the presumption of waiver, and this issue is waived. *See* Tenn. Code Ann. § 40-30-112 (repealed 1995). Based upon this overall record and the petitioner's theory of defense at trial, we also are of the opinion that, substantively, the issue is without merit.

IV.

The petitioner contends that the post-conviction trial court erred in denying funds for investigative services. He faults the post-conviction court for granting a hearing on the motion for expert services and ordering the petitioner to provide the state a copy of his *ex parte* motion. In addition, the petitioner faults the court for allowing the state to participate in the hearing. The petitioner cites *Owens v. State,* 908 S.W.2d 923, 924 (Tenn. 1995) for the proposition that post-conviction petitioners are entitled to an *ex parte* hearing on a motion for defense services as long as procedural requirements are met.

The state contends that the trial court did not err in denying the investigative services of Mr. Ronald Lax and Ms. Gloria Shettles at a cost not to exceed $27,500 and neuropsychological services of Dr. Eric Engum in an amount not to exceed $5,000. The state asserts that the trial court did, in fact, grant an *ex parte* motion in part by ordering payment to Dr. Engum in the amount of $1,200. When the petitioner's post-conviction counsel filed a motion to rehear, the trial court held a hearing at which time it

concluded that the amount of $1,200 payment to Dr. Engum (although the amount was later increased) was sufficient and otherwise denied the petition to rehear. The petitioner then filed an application for permission to appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure challenging the trial court's refusal to grant funds for investigative services. The state contends that the petitioner has waived any other claims concerning an *ex parte* hearing. The Rule 10 application was denied by this Court.

The state cites *Owens* for the proposition that its holding should not be interpreted as a "blank check" requiring courts to hold *ex parte* hearings and to authorize funds in every case. The state contends that the affidavits of Ms. Shettles and Mr. Lax failed to demonstrate that professional investigative services were required in this case.

In *Owens,* the Supreme Court examined its cases in the direct appeal context and found the principles regarding investigative funds to be the same. The Court found that in *State v. Evans,* 838 S.W.2d 185, 192 (Tenn.1992), a defendant has to show that a substantial need exists requiring the assistance of state-paid support services and that a defendant's defense cannot be fully developed without such assistance. The petitioner's motion and affidavits failed to explain why the investigative work could not have been done by the attorneys and must have been done by the investigators. The petitioner has not shown why these professional investigative services are required. It should be pointed out that once an individual has gone beyond the trial and

direct appeal level in a case, the state does not have to write a blank check for investigative services. Just because a particular service might be of some benefit does not mean that it is constitutionally required. We agree that Judge Byers was correct in his refusal to grant the additional expert services in this post-conviction case. Furthermore, we find no prejudice regarding the allegations of the state's participation in the *ex parte* hearing. The petitioner simply has not carried his burden to show how the post-conviction hearing judge committed reversible error. This issue is without merit.

CONCLUSION

After reviewing the record, briefs, and arguments, this Court concludes that the decision by the post-conviction judge denying post-conviction relief should be, and is, affirmed. The petitioner's death sentence will be carried out unless stayed by competent authority. The petitioner's execution date is set for October 1, 1998.

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN MICHAEL WEST,
Petitioner-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellee.

Nos. 05-5132, 05-6219.

Filed: May 20, 2008.

ORDER

BEFORE: BOGGS, Chief Judge; NORRIS and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly,

the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

(3)

No. 09-461

Supreme Court, U.S.
FILED
JAN 20 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

STEPHEN MICHAEL WEST,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Whether the court of appeals properly denied federal habeas relief, in light of evidence developed in state post-conviction proceedings, on petitioner's claim that trial counsel was constitutionally ineffective for failing to investigate and present evidence of petitioner's childhood abuse during his capital sentencing proceeding.

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OPINION BELOW

The opinion of the court of appeals that is the subject of this petition is published at 550 F.3d 542. (Pet. App. 1a). The memorandum opinion and order of the district court relevant to West's claim (Pet. App. 59a, 364a) are unreported.

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were entered on December 18, 2008. (Pet. App. 1a). The court denied rehearing on May 20, 2009. (Pet. App. 428a). By order entered July 22, 2009, Justice Stevens extended the time for filing a petition for writ of certiorari from August 18, 2009, until October 17, 2009. (09A87). Petitioner filed a certiorari petition on October 19, 2009. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254, which governs the remedy of federal habeas corpus for applicants in state custody, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States.

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

* * *

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) The claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

I. Procedural History

On March 25, 1987, a Union County, Tennessee, jury convicted the petitioner, Stephen West, of the first-degree premeditated murders of Wanda Romines and her daughter, Sheila Romines, aggravated kidnapping of both victims, and aggravated rape of Sheila Romines. Finding three statutory aggravating circumstances applicable to each of the murders – that the murders were especially heinous, atrocious or cruel; that they were committed to avoid arrest or prosecution; and that they were committed while the defendant was engaged in committing first degree murder, rape or kidnapping – the jury sentenced petitioner to death. *See* Tenn. Code Ann. § 39-2-203(i)(5), (6) and (7) (1982) (repealed 1989). The Tennessee Supreme Court affirmed the judgment. *State v. West*, 767 S.W.2d 387 (Tenn. 1989), *cert. denied*, 497 U.S. 1010 (1990).

West filed a state petition for post-conviction relief in 1990. Following an evidentiary hearing, the

trial court denied relief. The Tennessee Court of Criminal Appeals affirmed the trial court's judgment. *West v. State*, No. 03C01-9708-CR-00321, 1998 WL 309090 (Tenn. Crim. App. June 12, 1998). (Pet. App. 404a). West subsequently filed an application for permission to appeal to the Tennessee Supreme Court pursuant to Tenn. R. App. P. 11. The Tennessee Supreme Court granted West's application on a single issue and, on January 5, 1998, affirmed the judgment of the Court of Criminal Appeals denying the post-conviction petition. *State v. West*, 19 S.W.3d 753 (Tenn. 2000).

On February 20, 2001, West filed a motion for appointment of counsel and for stay of execution in the United States District Court for the Middle District of Tennessee. *West v. Bell*, No. 3:01-cv-00174 (M.D. Tenn.) (J. Campbell). The district court appointed counsel and transferred the case to the Eastern District of Tennessee, which granted a stay of execution on February 23, 2001. *West v. Bell*, No. 3:01-cv-00174 (M.D. Tenn. Feb. 21, 2001). West filed a petition for writ of habeas corpus on June 7, 2001, and an amended petition on February 25, 2002. On September 30, 2004, the district court entered a memorandum opinion and order granting respondent's motion for summary judgment. (Pet. App. 59a). The court altered its judgment, in part, on December 10, 2004. (Pet. App. 364a). West appealed.

On December 18, 2008, the United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. *West v. Bell*, 550 F.3d 542 (6th Cir.

2008) (reh. denied). (Pet. App. 1a). That decision is the subject of the instant petition.

II. Facts Relevant to the Petition

A summary of the evidence presented at petitioner's trial appears in the opinion of the Tennessee Supreme Court on direct appeal. *State v. West*, 767 S.W.2d 387, 389-92 (Tenn. 1989).

In addition, the district court summarized the evidence at petitioner's trial and sentencing hearing in its memorandum opinion. (Pet. App. 61a-78a).

In 1990, West filed a petition for post-conviction relief in the state courts alleging, among other things, ineffective assistance of counsel during the sentencing phase of his trial. Following evidentiary proceedings in September and October 1996, the post-conviction court denied relief. A summary of the evidence presented in that proceeding is included in the opinion of the Tennessee Court of Criminal Appeals and in the district court's memorandum opinion. (Pet. App. 79a-109a, 406a-419a). The post-conviction court denied relief, concluding that petitioner had failed to carry his burden with respect to the allegations, particularly in light of "conflicting testimony regarding mitigation evidence that trial counsel failed to present." (Pet. App. 422a). The Tennessee Court of Criminal Appeals affirmed, concluding that, "in light of this conflicting evidence, the petitioner did not meet his burden with respect to the allegation of ineffective counsel at the sentencing phase." The court further concluded that petitioner "failed to show

how he was prejudiced by any acts or omissions of counsel." (Pet. App. 422a). The Tennessee Supreme Court granted review on a single issue that was unrelated to the ineffective assistance claim and did not address the ineffective assistance issue in its opinion. *State v. West*, 19 S.W.3d 753 (Tenn. 2000).

III. The Opinions Below

The district court denied West's petition for habeas corpus relief. In reviewing the merits determination by the Tennessee courts on petitioner's ineffective-assistance claim, the district court observed that both the state post-conviction and appellate courts agreed that there was conflicting evidence "regarding the *existence* of mitigating evidence that trial counsel failed to present and that, in light of the conflicting evidence, Petitioner failed to meet his burden with respect to the allegation of ineffective assistance of counsel at the sentencing phase." (Pet. App. 173a) (emphasis added). The district court further observed that petitioner submitted numerous affidavits and evidence in the federal habeas proceeding that was not presented to the Tennessee state courts, yet "offered no explanation as to why this new evidence was not presented to the state courts other than a general statement" about the lack of necessary resources in state post-conviction proceedings (a claim the district court found dubious). (Pet. App. 177a). The court specifically found that petitioner failed to carry his burden under 28 U.S.C. § 2254(e)(2) to allow the federal court to consider the new evidence, specifically that "[p]etitioner has failed to

demonstrate cause, unattributable to himself or his trial counsel, for failing to present these witnesses and this evidence in state court." (Pet. App. 181a).

> Because 28 U.S.C. § 2254(e)(2) is an express limitation on the district court's jurisdiction, this Court is restricted to the extent that it may only consider the state court's determination of the facts in light of the evidence presented in the state court proceeding. Additionally, 28 U.S.C. § 2254(e)(2) is an express limitation on the Court in deciding whether to hold an evidentiary hearing. Consequently, Petitioner's failure to develop the facts of this new evidence in the state court proceedings and his failure to demonstrate the failure was not attributable to him or his trial counsel prevents this Court from considering the new evidence to support this claim because the criteria which would allow this Court to consider the new evidence has not been satisfied. Therefore, the Court will only consider the evidence fairly presented to the state court when evaluating the state court's decision.

(Pet. App. 182a). As to petitioner's allegations of childhood abuse, the district court further observed:

> [A]lthough there are allegations that Petitioner was abused as a child, *there is no substantially reliable evidence to support this allegation*. First, the fact that the claim of abuse was not raised until after Petitioner received a death sentence is suspect. Second, Petitioner has not made a credible

> showing that he actually suffered any abuse. Petitioner's strongest proof of abuse is testimony by his oldest sister, Debra West. However, *her testimony of alleged abuse of Petitioner substantially contradicts the testimony she presented during the sentencing hearing.*

(Pet. App. 185a) (emphasis added).

The district court concluded that the state courts' determination of petitioner's ineffective-assistance claim was "based on a reasonable determination of the facts in light of the evidence presented in the state court proceeding, and that the decision was not contrary to *Strickland*." (Pet. App. 188a).

The court of appeals affirmed. Although the appellate court first determined that the post-conviction court (at the trial court level) had articulated an incorrect standard for prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), the court concluded that the state-court record "demonstrates that West's counsel was not so ineffective as to constitute a denial of his constitutional rights." (Pet. App. 20a). After citing the specific deficiencies asserted by the petitioner in his federal habeas appeal, the court ruled that, "[w]e are not convinced . . . that all of these are actually errors, let alone errors that rise to the level of ineffective assistance." (Pet. App. 21a).

Specifically as to petitioner's allegations of childhood abuse, the court observed that the proof presented in state proceedings raised serious questions as to whether any such abuse occurred at all.

> In the case at hand, the most significant alleged error – the failure to adequately investigate West's past abuse – is also the most contested. Debbie West claims she informed [trial counsel] about the abuse, but the attorneys strongly deny that. The two psychologists, Engum and Bursten, disagree over whether West's evaluations contain evidence of abuse; and Bursten testified that West specifically denied being abused.

(Pet. App. 23a).

The court of appeals outlined trial counsel's investigative efforts, including multiple interviews with family members, obtaining numerous historical records, including school and military records, and counsel's investigation into West's mental state. Citing *United States v. Cronic*, 466 U.S. 648 (1984), the court correctly observed that the high level of deference afforded counsel's performance means that, "we address not what is *prudent* or *appropriate*, but only what is *constitutionally compelled*." (Pet. App. 22a) (emphasis added). Finally, the court of appeals concluded that, even if West could prove that his counsel was ineffective, "[g]iven the strength of the evidence against West presented at trial and the weakness of the mitigating evidence presented during [state] post-conviction proceedings, we cannot conclude that there was a reasonable probability that the jury would have chosen to spare West's life." (Pet. App. 26a).

ARGUMENT

THE COURT OF APPEALS PROPERLY CONFINED ITS ANALYSIS OF PETITIONER'S INEFFECTIVE ASSISTANCE CLAIM TO EVIDENCE DEVELOPED IN STATE POST-CONVICTION PROCEEDINGS AND CORRECTLY CONCLUDED THAT, IN LIGHT OF THAT EVIDENCE, PETITIONER FAILED TO SHOW THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING HEARING.

Petitioner argues that certiorari review is warranted because the court of appeals failed to consider evidence – presented for the first time in federal habeas proceedings – showing that he suffered severe childhood abuse. He further contends that the court of appeals "trivialized" the significance of the mitigation evidence in question. His petition should be denied. During state post-conviction proceedings, petitioner had a full and fair opportunity to develop the factual basis of his ineffective-assistance claim. But the proof presented to the state courts was contradictory and failed to show with any degree of reliability that petitioner suffered the severe childhood abuse he now asserts, let alone that counsel's performance fell below the level of constitutional effectiveness. Consistent with 28 U.S.C. § 2254(e)(2), both the federal district court and court of appeals refused to consider evidence that had not been fairly presented to the state courts. The district court observed that much of the evidence asserted to

support West's abuse allegation was never fairly presented to the state courts and specifically found that petitioner failed to carry his burden under § 2254(e)(2) to allow the federal court to consider the new evidence. "Because § 2254(d)(2) is an express limitation on the district court's jurisdiction, this Court . . . may only consider the state court's determination of the facts in light of the evidence presented in the state court proceeding." (Pet. App. 181a). The district court correctly perceived its jurisdictional limitations, and its rejection of West's "new evidence" as consistent with its statutory limitations.[1]

Although the court of appeals concluded that the state post-conviction court had recited an incorrect standard for prejudice under *Strickland*, it correctly observed that habeas relief was warranted only if West "is in custody in violation of the constitution or laws or treaties of the United States." 28 U.S.C.

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[1] The district court made specific findings as to each item in question, concluding that West had failed to carry his burden of demonstrating either that he was not at fault in failing to present the evidence in state court proceedings (*e.g.*, affidavits of Debra Harless and Vestor West, West's military form DD-214, the affidavit of Patty Rutherford, and reports of Dr. Coleman and Dr. Dudley) or that a fundamental miscarriage of justice would result from the Court failing to consider the evidence (*e.g.*, affidavit of Keith Caruso, M.D., records from Community Hospital, and an affidavit from Karen West Bryant). The district court further explained the deficiencies in West's case in its December 10, 2004, order supplementing its original memorandum order and judgment. (Pet. App. 376a).

§ 2254(a). To warrant relief on a claim of ineffective assistance of counsel, a criminal defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The proper standard for attorney performance is that of "reasonably effective assistance," *Strickland*, 466 U.S. at 687, and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.*, 466 U.S. at 689. Accordingly, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable effective assistance." *Id.*

In addition, a defendant claiming ineffective assistance must affirmatively prove prejudice, and the appropriate test for such prejudice is whether the defendant has shown "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* Even if professionally unreasonable, an error by counsel does not warrant setting aside a criminal conviction if it had no effect on the final judgment. *Smith v. Jago*, 888 F.2d 399, 404-05 (6th Cir. 1989) (citing *Strickland*, 466 U.S. at 691). "When a [petitioner] challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and

mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Here, the court of appeals properly recognized the high level of deference accorded defense counsel's decisions under *Strickland,* coupled with the fact that many of West's allegations concerning counsel's performance were weakened by conflicting testimony at the state post-conviction hearing, inconsistencies in the statements and opinions of West's own witnesses, and West's own failure to relate any instance of childhood abuse to either trial counsel or his mental health expert prior to trial.

> In the case at hand, the most significant alleged error – the failure to adequately investigate West's past abuse – is also the most contested. Debbie West [petitioner's older sister] claims she informed [trial counsel] about the abuse, but the attorneys strongly deny that. The two psychologists, Engum and Bursten, disagree over whether West's evaluations contain evidence of abuse; and Bursten testified that West specifically denied being abused.

(Pet. App. 23a). Indeed, after examining the specific allegations of deficiency in view of counsel's actual performance at trial, the court of appeals observed, "We are not convinced . . . that all of these are actually errors, let alone errors that rise to the level of ineffective assistance of counsel." (Pet. App. 21a).

The court's ruling is entirely consistent with *Strickland*, which instructs that "[j]udicial scrutiny of

counsel's performance must be highly deferential," and a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Moreover, a defendant's role in influencing counsel's decisions must be taken into account. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. As this Court stated in *Burger v. Kemp*, when considering claims of ineffective assistance of counsel, the issue is "not what is prudent or appropriate, but only what is constitutionally compelled." 483 U.S. 775, 794 (1987). "We have decided that 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Id.* at 794 (citing *Strickland*, 466 U.S. at 690-691). Moreover, where, as here, neither West nor any family member informed trial counsel of alleged childhood abuse during any of the "multiple" pretrial interviews, where West himself specifically denied abuse during a pretrial mental health evaluation by Dr. Ben Bursten, and where none of the "numerous historical records" counsel examined nor any material submitted in federal habeas proceedings substantiated West's claim of abuse,[2] counsel cannot be faulted

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[2] The district court specifically found that the record submitted in federal habeas proceedings purporting to be from Community Hospital "bears no indicia to substantiate [the abuse] claim." (Pet. App. 178a). In addition, the court found that it "has

(Continued on following page)

for failing to discover that information, if it existed at all.

The court of appeals' opinion reflects a faithful application of *Strickland*'s performance standard in light of counsel's actual performance at West's trial with due consideration to information gained by counsel in the course of reasonable investigative efforts, including "multiple" interviews of family members, examination of "numerous historical records," including school and military records, interviews of West himself, and an independent psychological evaluation, which revealed no evidence of the personality disorder diagnosed by West's mental health expert 9½ years after his trial and conviction. (Pet. App. 23a). Counsel's performance in this case is thus easily distinguished from the situation in *Rompilla v. Beard*, 545 U.S. 374, 389 (2005), in which this Court found counsel deficient in failing to review available court records concerning a prior felony conviction.

Further, petitioner misreads the court of appeals' decision as "trivializing" the mitigation evidence in

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not been directed to any medical records to substantiate Petitioner's allegations of physical abuse or medical records to support his allegation that the abuse resulted in several surgeries." (Pet. App. 176a). In its ruling on West's motion to alter or amend, the district court further observed that although petitioner had attached certain medical records (some of which were illegible) to his motion to alter or amend to support his abuse claim, he failed to "point out which record contains evidence of abuse, and the Court has found no such record." (Pet. App. 385a).

question. The decision in this case turned primarily on the panel's assessment that the evidence presented in petitioner's state post-conviction proceedings failed to show that trial counsel's performance was constitutionally deficient. In the alternative, the Court held that "even if West could prove that his counsel was ineffective for all of the reasons he cited, he has not shown that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (Pet. App. 25a). The court's admitted speculation, in *dicta,* concerning the likelihood that alleged evidence of childhood abuse may have cut against West in the jury's final analysis does not undermine its prejudice determination or trivialize the evidence in question.[3] Rather, the court of appeals properly recognized that the weakness of any such evidence during state post-conviction proceedings rendered it unnecessary to engage in such speculation, because the available evidence did not give rise to a "reasonable probability" that the proceeding would have been different. "Given the strength of the evidence against West presented at trial and the weakness of the mitigating evidence that West presented during the post-conviction proceedings, we cannot conclude that

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[3] This Court has itself recognized that certain mitigating evidence has the potential to act as a two-edged sword in a jury's sentencing deliberations. *See, e.g., Brewer v. Quarterman*, 550 U.S. 286 (2007); *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002).

there was reasonable probability that the jury would have chosen to spare West's life." (Pet. App. 26a).

In *Burger,* the Court noted that a Acapital sentencing proceeding 'is sufficiently like a trial in its adversarial format and in the existence of standards for decision' that counsel's role in the two proceedings is comparable – it is 'to ensure that the adversarial testing process works to produce a just result under the standards governing decision.'" 483 U.S. at 788 (citing *Strickland*, 466 U.S. at 686, 687). Accordingly, the Court stated that when a habeas petitioner claims that his trial counsel failed to develop and present mitigating evidence, the court must determine whether counsel's "performance in evaluating the mitigating evidence available to him, and deciding not to pursue further mitigating evidence, undermines the confidence in the adversarial process" of the case. *Id.* at 788-789. The Court further noted that the relevancy of the mitigating evidence that might have been presented, "and the trial court's corresponding duty to allow its consideration have no bearing on the quite distinct question" of "whether counsel acted reasonably in deciding not to introduce the evidence out of apprehension that it would contribute little to his client's chances of obtaining a life sentence while revealing possibly damaging details about his past and allowing foreseeably devastating cross-examination." *Id.* at 790 n.7.

In *Burger*, the petitioner claimed that his trial counsel had not made an adequate investigation of potentially mitigating evidence. At an evidentiary

hearing, the petitioner presented evidence that could have been presented in mitigation. The hearing revealed that his trial counsel had interviewed his mother, friends, acquaintances, and a psychologist who had examined him. The hearing also revealed that his trial counsel had reviewed psychological reports. *Id.* at 789-92. The federal district court denied relief. After reviewing the evidence presented at the evidentiary hearing, this Court affirmed. The Court held that Burger's trial counsel was not ineffective, because he had interviewed a sufficient number of potential witnesses under the circumstances and had a reasonable strategic basis for not presenting some of the potentially mitigating evidence he had uncovered through his investigation. *Id.* at 794-95.

Here, petitioner's counsel did make an investigation. Counsel interviewed petitioner's family on numerous occasions and obtained a mental health examination of petitioner. They also spent many hours with the petitioner impressing upon him the seriousness of his case and exploring his background looking for a defense. Based upon their investigation, there was no evidence from which to conclude that petitioner had been physically abused as a child or that further investigation was warranted. Trial counsel testified in state court proceedings that he discussed the petitioner's background with his parents and at least one sister. He stated that the petitioner never mentioned any physical abuse and that none of the family members had ever raised the issue.

Trial counsel also arranged for petitioner to be evaluated by a psychiatrist, who testified that, at the time he evaluated the petitioner, there was no reason to believe that the petitioner had been abused as a child. Indeed, petitioner specifically denied any such abuse.

Under these circumstances, and in light of the evidence properly developed in the state court proceedings, the court of appeals correctly concluded that petitioner failed to demonstrate that he received constitutionally ineffective assistance; thus, review by this Court is unwarranted.

CONCLUSION

The petition for writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
FEB - 2 2010
OFFICE OF THE CLERK

No. 09-461

IN THE
Supreme Court of the United States

STEPHEN MICHAEL WEST,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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February 2, 2010

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REPLY BRIEF

Respondent does not even attempt to justify the Sixth Circuit's ruling in this case that trial counsel's failure to present evidence of petitioner's childhood abuse was not mitigating because the jury might find that "violence begets violence," or to contest that this ruling demonstrates a serious and deepening rift in the lower courts on the question of how to treat potentially "double-edged" mitigation evidence in a *Strickland* prejudice analysis. Instead, the State tries to convince this Court that the instant case is not a proper vehicle for addressing that question, contending there is doubt about what evidence is properly before the Court and about the reliability of that evidence. There is no validity to these claims, and the State cannot deflect attention from the issue in this case. Indeed, in many respects respondent's assertions on this score can only be characterized as misleading. As petitioner made clear, *see* Pet. 17 n.6, he relies solely on the evidence that was presented to the state post-conviction court. And based on that evidence, there is no question that the sentencing jury could have been presented with a powerful mitigation case that told the story of the terrible abuse that West suffered as a child and its psychological consequences. Accordingly, this Court should address and resolve the question of whether such abuse could ever be considered aggravating as well as mitigating and, if so, whether the failure to present such evidence can be dismissed out of hand for that reason under *Strickland*.

ARGUMENT

1. Respondent contends that "Petitioner argues that certiorari review is warranted because the court of appeals failed to consider evidence – *presented for the first time in federal habeas proceedings* – showing that he suffered severe childhood abuse." Opp. 10 (emphasis added); *see also id.* at 10-11 & n.1. That claim is patently false, as the petition makes clear. Substantial evidence of West's childhood abuse was presented in the state habeas proceedings, and petitioner has not relied on a single piece of evidence of abuse that was not before the *state* post-conviction court. Although West attempted to amplify his claim in the federal habeas proceedings, none of that evidence is cited or mentioned in the petition – and petitioner most certainly does not contend that the federal courts' refusal to consider additional evidence is a "basis" for this Court's review. *Id.*; *see* Pet. 17 n.6 ("Although in petitioner's view this ruling [of the federal court not to consider the additional evidence] was in error, *petitioner does not rely on that contested evidence in this petition.*" (emphasis added)).

As the petition explains, the state post-conviction court heard substantial testimony from petitioner's sisters and an aunt about the terrifying abuse West's parents inflicted on him throughout his childhood. Pet. App. 86a-87a, 98a-100a. His sister Debra testified, for example, that West was born in a mental hospital after their mother attempted suicide, that he was hit so hard that he became cross-eyed, and that he reacted submissively to the abuse. Pet. App. 86a-87a. His sister Patricia testified their mother would beat her and petitioner

with a belt, resulting in "[b]ruises, black eyes, busted lips, pulled hair, [and] pinch marks." Pet. App. 98a. His aunt testified that his mother was "constantly" hitting him, that his mother threw him against walls, and that his mother said she would have killed "the little bastard" if she could get away with it. Pet App. 99a.

West also introduced evidence in the state post-conviction court that his trial counsel were aware of a number of red flags that would have led reasonable attorneys to conduct a more thorough investigation into his background and psychological makeup. West's counsel knew, for example, that he had virtually no memories of the first ten years of his life, 6th Cir. JA at 1857-58, and that he suffered from drug and alcohol problems, Post-Conviction Hr'g Tr. 408 (Oct. 22, 1996). Nevertheless, despite these and other indicators, West's trial counsel admitted at the state post-conviction proceedings that they did not conduct a probing investigation into West's background or childhood or obtain any school, employment, or medical records. 6th Cir. JA at 1969-70.

This record squarely raises the question presented in this case: whether counsel's failure to uncover and present evidence of severe childhood abuse can be dismissed on a theory that the jury might conclude that "violence begets violence," thereby foreclosing a conclusion that the defendant was prejudiced. It is true that in federal court West attempted to introduce a limited amount of additional evidence, including affidavits from experts that corroborated expert testimony presented in the

state court proceedings, a hospital record, West's military discharge form, and affidavits from West's ex-wife, father, former boss, and sister Debra.[1] But none of this additional evidence is necessary in the least to establish petitioner's *Strickland* claim, and the lower courts' possible additional error in excluding it therefore does not in any way counsel against a grant of certiorari.

2. Respondent's argument that the fact of West's childhood abuse is somehow in dispute is also misleading. At the state post-conviction hearings where the evidence of abuse was first presented, the State called no witnesses to contradict family members' testimony about the horrific abuse West suffered. Notably, the testimony of petitioner's aunt Ruby West, who witnessed West's mother throw him against a wall, stands utterly uncontradicted. Moreover, the state courts made no factual findings that witnesses to West's abuse were not credible.

Instead, the state courts held in a conclusory fashion that due to "conflicting evidence," West had "failed to meet his burden" of proof. Pet. App. 173a. Respondent uses that vague reference in an attempt to argue that the post-conviction witnesses were not believable. But, as the Sixth Circuit recognized, the state courts' conclusion was nothing more than an unreasonable application of law, reflecting the erroneous view that West was required to prove by a preponderance of the evidence that the outcome of his case would have been different, rather than

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[1] The District Court noted that the affidavit from Debra was substantially the same as her testimony in the state post-conviction court. Pet. App. 176a-177a.

simply showing a reasonable probability of a different outcome. Pet. App. 18a-20a. That certainly does not create a factual issue about the existence of the powerful mitigating evidence that could have been, but was not, presented to the sentencing jury in this case.

The Sixth Circuit never suggested otherwise. Indeed, respondent's assertion that the Sixth Circuit observed "that the proof presented in state proceedings raised serious questions as to whether any such abuse occurred at all," Opp. 8, is flatly untrue. The Sixth Circuit did note the existence of a factual dispute, but only one centered around whether trial counsel failed "to adequately investigate West's past abuse," not around whether the abuse ever occurred. Pet. App. 23a. Indeed, the Sixth Circuit accepted the fact of the abuse as a given.

The factual dispute that the Sixth Circuit actually mentioned relates only to whether counsel was specifically told about the abuse prior to West's sentencing. *See id.* (discussing whether West's sister "informed [trial counsel] about the abuse," whether the psychologist's report showed abuse, and whether West denied that he had been abused). But that dispute is itself irrelevant given the red flags in West's background that should have alerted counsel to investigate further – an obligation of which counsel was not relieved simply because the victim of the abuse did not remember it or was unwilling to admit to it. *See Rompilla v. Beard*, 545 U.S. 374, 389-90 (2005). There is no question that, despite the

existence of many red flags, counsel failed in their duties in a number of ways:

- Counsel failed to gather West's birth and medical records;
- Counsel sent out a subpoena for school records when it was too late for those records to arrive;
- Counsel investigated West's background by asking questions of the family while they were all in a group, a group that included the parents who had inflicted the abuse;
- Counsel never spoke with West's sister, Patricia, or with his aunt, Ruby West;
- Counsel's mental health expert who briefly examined West for competency and sanity never asked members of West's family about possible abuse because he felt it would be insulting to them;
- Counsel's investigator never looked into sentencing issues; and
- Counsel had no experience in sentencing phase litigation.

None of these facts presented in support of West's claims of ineffectiveness has ever been disputed by the State. In fact, much of this evidence was presented by the State's own witnesses.[2]

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[2] Trial counsel admitted, for example, that they did not gather records and that they interviewed family members as a group, and it is also undisputed that they never talked to Ruby West. 6th Cir. JA at 1969-71, 1991. The mental health expert, Dr.

Finally, respondent relies on the fact that the District Court complained about a lack of documentation to support West's allegations of abuse. Further records to substantiate West's allegations of abuse were simply unavailable to counsel at the time of the state post-conviction hearing. In response to the District Court's complaints about the lack of medical records to support petitioner's allegations, petitioner explained why such documentary evidence had not been presented to the state court, supplying the District Court with a letter from University Hospitals in Cleveland, dated October 12, 2001. Letter from Kathy Loflin, University Hospitals Health System, to Sharlott A. Swanger, Federal Defender Services of Eastern Tennessee, Inc. (Oct. 8, 2001) (attached to Pet'r's Mot. to Alter or Am. Mem. & Order & J. (Oct. 15, 2004)). The letter informed petitioner's counsel that "[y]our request for medical records from the 1960's for the above named patient is unable to be processed. Per University Hospitals of Cleveland policy, records are destroyed after 22 years of continuous inactivity." *Id.* These records might have been available at the time of petitioner's trial in 1987. They were not available at the time of his post-conviction hearing, or at the time his habeas petition was considered. Petitioner's inability to produce them does not detract in any way from the credibility of the witnesses who testified in the state post-conviction court.

Bursten, stated that he did not want to offend the family by asking them questions about abuse. Pet. App. 101a-102a.

For all these reasons, the record developed in this case simply does not support respondent's arguments that West's petition fails because of a lack of believable mitigation. This Court can and should consider the Sixth Circuit's decision on its own terms.

3. Respondent's attempt to muddy the waters on the issue of whether counsel's performance in this case was deficient also should be rejected out of hand. As noted above, respondent never contests the existence of numerous red flags of abuse of which trial counsel was aware; respondent also never suggests that counsel followed up on those warning signs in any way. Instead, respondent appears to argue that the mere existence of some amount of investigation at the sentencing phase of the case – such as group conversations with family members (albeit ones in which questions about abuse were not even asked) and a perfunctory competency evaluation by Dr. Bursten – is enough to preclude an ineffective assistance claim.

That is not the law. This Court's decisions in *Wiggins v. Smith*, 539 U.S. 510 (2003) – a case that respondent never mentions – and *Rompilla v. Beard*, 545 U.S. 374 (2005), establish that counsel's obligation is to conduct a reasonable investigation, and that the relevant question is "whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. The question is not, as the Sixth Circuit erroneously claimed, whether the quantum of investigation is

large enough.[3] Pet. App. 23a (stating that counsel were not deficient because they "did a fair amount of investigation"). Counsel also may not simply rely on what the defendant or his family reports. *See Rompilla*, 545 U.S. at 389-90; *compare* Opp. 13-15.

In addition, the State fails to acknowledge that the Sixth Circuit's trivialization of the abuse evidence was integral to its conclusion that counsel were not deficient in failing to investigate and present that evidence. In other words, because the Sixth Circuit believed that evidence of childhood abuse could have caused the jury to "despise" West "with greater zeal," Pet. App. 26a, the court did not view the failure of trial counsel to investigate that evidence thoroughly as particularly important. It is that issue – whether the Sixth Circuit's view of the significance of the mitigation evidence is a permissible one – that is central to the petition and that the State simply does not confront.

4. On the key question of prejudice, as to which the lower courts are at odds and this Court's guidance is necessary, the State is almost entirely silent. In passing, it suggests that the Sixth Circuit's dismissal of childhood abuse on the ground that "violence begets violence" was dicta and that its prejudice analysis actually turned on some

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[3] The Sixth Circuit stated that West's trial counsel consulted "numerous historical records." Pet. App. 23a. It is undisputed that counsel did not consult essential records such as West's birth and medical records, his school records, or any other records that might have illuminated his family history. 6th Cir. JA at 1969-71.

independent assessment of the mitigation evidence as weak. That is simply not so.

As the petition discusses at length, there is no question that when the Sixth Circuit stated that the mitigating evidence here was "weak" it was referring to its conclusion that the evidence was aggravating because it could have caused the jury to "despise" West for what his parents did to him. That conclusion is inexplicable and inconsistent with this Court's precedents on the nature of mitigation evidence. Moreover, even assuming that it were true that the evidence at issue somehow could be considered to be aggravating, the Sixth Circuit's determination that it could discount the evidence on that basis deepens a split among the lower courts on the consequence of counsel's failure to investigate and present possibly "double-edged" mitigation evidence.

The Court of Appeals never characterized the mitigating evidence as "weak" in any other respect. Nor could it have. The evidence of the abuse that petitioner suffered as a child was shocking and disturbing, and similar to the evidence that this Court found clearly prejudicial in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins*, and *Rompilla*. It is impossible to imagine that this evidence – which was not only mitigating because it would have elicited understanding and compassion, but also because it was consistent with West's otherwise inexplicable behavior during the crime – would not have caused at least one juror to change his or her mind. *See Wiggins*, 539 U.S. at 537-38; *see also Porter v. McCollum*, 130 S. Ct. 447, 448 (2009) ("we are

persuaded that it was objectively unreasonable to conclude there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented").

Respondent also points out in a footnote that "[t]his Court has itself recognized that certain mitigating evidence has the potential to act as a two-edged sword in a jury's sentencing deliberations." Opp. 16 n.3.[4] Respondent's point is correct – and unremarkable. While this Court has recognized that mitigation evidence may in some circumstances have an aggravating edge, it has not addressed whether a failure to present mitigating evidence can be summarily dismissed on that basis in a *Strickland* prejudice analysis, as the Sixth Circuit did here. As the petition discusses more fully, the Fourth, Fifth, and Sixth Circuits and the Supreme Court of Florida have ruled that it may be,[5] and the Third, Eighth, Ninth, and Tenth Circuits and the Supreme Court of Georgia have ruled that it may not. If West's case had been heard in one of the courts that give due

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[4] In support, Respondent points to *Brewer v. Quarterman*, 550 U.S. 286 (2007), and *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002). Opp. 16 n.3. Neither of these decisions addresses the significance of counsel's failure to investigate and introduce mitigation evidence in connection with an ineffective assistance of counsel claim.

[5] In addition to the citations in the petition, see also *Porter*, 130 S. Ct. at 455 (observing that "the Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's childhood abuse and military service").

weight to even double-edged mitigation evidence, the outcome would very likely have been different. *See Porter*, 130 S. Ct. at 455 (concluding that it was "unreasonable to conclude that Porter's military service would be reduced to 'inconsequential proportions' simply because the jury would also have learned that Porter went AWOL on more than one occasion." (citation omitted)). The disagreement in the lower courts on this recurring issue calls out for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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(5)

No. 09-461

Supreme Court, U.S.
FILED
MAR 26 2010
OFFICE OF THE CLERK

IN THE
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STEPHEN MICHAEL WEST,

Petitioner,

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On Petition For A Writ Of Certiorari To The
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PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

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March 26, 2010

PETITION FOR REHEARING

Petitioner Stephen Michael West respectfully moves this Court to reconsider its March 1, 2010 Order denying West's petition for writ of certiorari.

West's petition called on this Court to clarify how federal habeas courts should properly weigh mitigating evidence in analyzing whether a petitioner has shown prejudice under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In West's case, a divided panel of the Sixth Circuit denied relief because it found that West had failed to show prejudice. In the panel's analysis, the evidence that West had suffered severe childhood abuse might have been aggravating rather than mitigating, because the jury might have believed that "violence begets violence" and therefore "despised" West with "greater zeal." Pet. App. 26a (*West v. Bell*, 550 F.3d 542 (6th Cir. 2008)). The court of appeals therefore discounted petitioner's evidence as potentially "double-edged," and found no prejudice from counsel's failure to discover and present it.

In his petition, West demonstrated that there is a growing split among the lower courts on the treatment of this type of mitigating evidence. As the petition discusses more fully, the Fourth, Fifth, and Sixth Circuits and the Supreme Court of Florida have ruled that mitigating evidence may be discounted if it could potentially have an aggravating edge. But the Third, Eighth, Ninth, and Tenth Circuits and the Supreme Court of Georgia have ruled that such evidence may not be so discounted.

This Court should reconsider its denial of certiorari in West's case because this issue continues to appear in court of appeals decisions. Further entrenching the split described above, the Ninth Circuit has recently reaffirmed its approach to mitigating evidence in two capital habeas cases, both of which were decided after West's petition and reply brief were submitted to this Court.

In *Rhoades v. Henry*, __ F.3d __, No. 07-99022, 2010 WL 761146 (9th Cir. Mar. 8, 2010), the Ninth Circuit ruled that evidence of childhood abuse suffered by the petitioner was properly considered mitigating. The Ninth Circuit ultimately denied relief because the record showed that the original sentencing court was already aware of the most relevant mitigating evidence. *Id.* at *22. In reaching this holding, however, the Ninth Circuit emphasized this Court's decisions indicating that evidence of severe childhood abuse, like that suffered by West, is indeed mitigating:

> In *Rompilla* [*v. Beard*, 545 U.S. 374 (2005)], the additional mitigating evidence showed that the petitioner was beaten by his father with his hands, fists, leather straps, belts, and sticks, [and] was subjected to yelling and verbal abuse . . . .
>
> In *Wiggins* [*v. Smith*, 539 U.S. 510 (2003)], the petitioner experienced severe privation and abuse in his first six years of life, and physical torment, sexual molestation, and repeated rape thereafter in foster care. . . .

> In *Williams* [*v. Taylor*, 529 U.S. 362 (2000)], new evidence showed the petitioner had been severely and repeatedly beaten by his father . . . .

Rhoades, 2010 WL 761146, at *19.

The same type of evidence that the Ninth Circuit held to be mitigating in *Rhoades* was presented during West's post-conviction hearing. West was beaten by his parents with his mother "[s]winging a belt so long and so hard that it would wear her out." Pet. App. 98a; 6th Cir. JA at 1955. The beatings left him with "[b]ruises, black eyes, busted lips, pulled hair, pinch marks." *Id.* He was also hit so hard that he became cross-eyed. Pet. App. 87a. Yet the Sixth Circuit inexplicably believed that this evidence could have been aggravating rather than mitigating.

In *Robinson v. Schriro*, 595 F.2d 1086 (9th Cir. 2010), the Ninth Circuit reversed the district court's denial of habeas relief because the district court's misunderstanding of the role of mitigating evidence caused it to "improperly reject or under-weigh valid mitigating evidence." *Id.* at 1112. In that case, the evidence that was "under-weigh[ed]" was very similar to the evidence that the Sixth Circuit found to be potentially aggravating in West's case: it was evidence of an impoverished, unstable, and abusive background. *Id.* The Ninth Circuit's ruling stands in stark contrast with the rule applied in West's case, and calls for this Court's intervention to ensure the fair and uniform administration of justice and the correct application of its jurisprudence in capital cases.

Indeed, the Sixth Circuit's approach in this case is so inherently erroneous that Petitioner respectfully requests that this Court reconsider its earlier decision on West's petition, grant his petition, and summarily reverse. The Sixth Circuit's holding that West's evidence of severe childhood abuse could actually incite the jury to "despise West and sentence him to death with greater zeal" flies in the face of this Court's jurisprudence on what constitutes mitigating evidence in a capital case. In the two recent cases cited in this Petition for Rehearing, the Ninth Circuit gave proper effect to this Court's decisions in *Rompilla*, *Wiggins*, and *Williams*. The fact that West's evidence was treated so differently from the similar evidence at issue in *Rhoades*, and that his case turned out so differently from *Robinson*, demonstrates the unfairness of the Sixth Circuit's decision and the need for this Court's intervention.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit fails to adhere to the precedent of this Court and conflicts with the decisions of other federal circuits. Rehearing should therefore be granted.

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CERTIFICATE OF COUNSEL

As counsel for petitioner Stephen Michael West, I hereby certify that this petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Supreme Court Rule 44.2.